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ABSTRACT

This document reports the oral and written testimony of five witnesses who addressed the accuracy, uses, abuses, and possible benefits of drug testing in the workplace at a Congressional hearing. The hearing was conducted to discuss H.R. 691, the Employee Drug Testing Protection Act, which would prohibit drug testing in the workplace except in specific incidents. During the hearing, testimony was given by two doctors, a United States Representative, a representative of the General Accounting Office, and a victim of a false-positive drug test who was unjustly fired. Testimony centered on the various tests available and the costs of each type, the accuracy of various types, and the use of the tests by employers and potential employers. Testimony in favor of drug testing focused on the increasing use of drugs and the potential benefit to society of eliminating drug abusers from the workplace, especially when they work in safety-related occupations. Testimony against drug testing (and in favor of the bill) stressed the possible injustices of false-positive tests, individual rights, costs, and possible abuses of any regulations put on employers. (KC)

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OVERSIGHT HEARING ON DRUG TESTING IN THE WORK FORCE

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, APRIL 21, 1988

Serial No. 100-70

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OVERSIGHT HEARING ON DRUG TESTING IN THE WORKFORCE

THURSDAY, APRIL 21, 1988

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2261 Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Hayes, Jontz, Jeffords, Gunderson, and Schumer.

Staff present: Eric Jensen, Valerie White, Jeff Fox, Terri Schroeder, and Mary Gardner.

Mr. MARTINEZ. I think we will go ahead and start. First, let me read my statement and get it out of the way and then we will be ready to take testimony.

Let me say that this subcommittee has scheduled an oversight hearing on drug testing in the workforce for today, April 21, 1988, at the request of Congressman Schumer. He has introduced H.R. 691, which is called the Employee Drug Testing Protection Act, prohibiting drug testing in the workplace except in specific incidents.

The hearing will address the accuracy, uses, abuses and possible benefits of drug testing in the workforce. Let me say that there is a national awareness in recent years about drug abuse. More recently, because of the deaths of a couple of young and prominent sports figures, and maybe because of a series of train accidents, there has been more of a national awareness of drug abuse especially in the workplace.

The concern about drug abuse and subsequently the concern for safety in the workplace has manifested itself into the belief of industry and employers of a need to drug test employees. A survey has indicated that the percentage of Fortune 500 companies screening employees or applicants has risen from 3 percent to around 30 percent between 1982 and 1985. Employers and other proponents who support drug testing argue that workers who abuse drugs have lower productivity, have more health problems and hence generate higher employer insurance premiums, have higher rates of absenteeism on the job and have a higher rate of accidents on the job. They say that drug users may be responsible for lawsuits against the employer by employees or customers who are injured by drug abusers, and they say that drug users may steal from their employ-

ers to support their drug habit or disclose confidential material in exchange for money or drugs.

However, unions, employees and other opponents of employee drug testing argue that drug testing violates the Fourth Amendment prohibition against unreasonable searches and seizures by the Government. The tests, they claim, are often inaccurate. They claim a positive test indicates only the presence of certain quantities of drug residue but is not evidence that an individual is impaired in his job performance.

They also say that there is a potential for abuse when the test information is revealed by an employer. Finally, they say that employers do not always enforce drug use regulations uniformly.

The final status of drug testing as a part of the work scene is still not clear. The limits that should be placed on drug testing are becoming slowly visible as a result of the growing number of court decisions that are being handed down.

We are here today to learn more about drug testing of employees and to receive testimony on H.R. 691.

Our first witness is the author of the bill, the Honorable Charles Schumer.

But before we take his testimony, I would like to know if any of the panel has opening statements.

Mr. Hayes.

Mr. HAYES. Mr. Chairman, I think that in the interest of time, I would just welcome our colleague here today and I will look forward to hearing his statement.

Mr. MARTINEZ. Thank you.

We will then go directly to Mr. Schumer.

Mr. Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK

Mr. SCHUMER. Thank you very, very much, Mr. Chairman. I am grateful to you and to the subcommittee for scheduling this hearing and for beginning the discussion, a very important discussion, on how to regulate drug testing in the private sector, because for millions of Americans drug testing is not some far-off high technology in the future, it is an everyday reality.

New studies, which the GAO will discuss, show that 49 percent of Fortune 500 companies now conduct drug tests on their employees. Estimates are that drug testing has more than doubled among these large firms in the past decade, and for millions of Americans, having a job means that they now must subject themselves to a drug test with no legal protection. The company decides on what kind of test, when to administer the test, who shall see it, and what opportunity, if any, the employee has. From start to finish, the company is the judge, the jury, and the executioner.

I might add, Mr. Chairman, that many of these companies have no safeguards at all. It is ironic to note that even the Reagan Administration, which has been very pro-drug testing, believes in stronger standards for its employees than many of the Fortune 500 companies and other companies have for their employees.

Today, Ms. Juanita Jones will testify. She lost her Government job, many friends, and even support from her church, because of a single inaccurate test. Fortunately, the courts reviewed the facts of her case and awarded her $300,000. But had she been a private employee, she would have had no legal recourse.

I think it is time that we in Congress realize that widespread drug testing is a fact of life for millions of Americans. The least we can do is provide some guidelines so American workers are not abused. My bill, the Employees Drug Testing Protection Act, guarantees what should be the most basic protections for any American citizen. The bill guarantees that employees cannot be subject to random drug tests unless there is probable cause or if they are in drug-sensitive occupations.

The bill guarantees that employees will have full access to their records and the ability to review the action of their employers. It also guarantees the employee's right to a highly accurate confirmatory test in the event that their first test is positive.

As you know, Mr. Chairman, there are many tests that are wildly inaccurate, and if a company now chooses to just use that test and say you're out because it was positive, hundreds of thousands of innocent people could lose their jobs.

Now, I believe that this bill only represents a first step. Since I first drafted it, I have had many excellent suggestions from unions and from companies that have had experience with drug testing, proposals to build into law clear rights of appeal and rehabilitation.

This committee has made a great step forward, and my compliments are to it for holding this hearing and beginning the debate on how to regulate drug testing. It is a crucial problem and I look forward to the work of this committee in creating legislative guidelines to keep fairness in the workplace. I can assure you of my assistance in whatever way I can be helpful.

Mr. Chairman, I have a complete statement—I have just given the highlights of it—which I would ask unanimous consent be read into the record.

Mr. MARTINEZ. Without objection, so ordered. Your prepared statement will be inserted immediately following your oral presentation.

Mr. SCHUMER. Thank you, Mr. Chairman.

[The prepared statement of Hon. Charles E. Schumer follows:]

STATEMENT OF HON. CHARLES E. SCHUMER, BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES, APRIL 21, 1988

Mr. Chairman, I am grateful for this opportunity to testify before your Committee and for the leadership you have provided in beginning this much needed discussion on regulating drug testing in the private workplace.

As is so often the case, technology, in this case drug testing, has crept into American society before the American legislative process has been able to fully comprehend and respond to what is happening. I believe that this hearing will have more than served its purpose if it can simply dispel the out of date notion that drug testing of American workers is the province of a few eccentric employers or an isolated industry or two. Drug testing is a reality for millions of Americans, in all walks of life, and many hundreds more companies will adopt drug testing programs before even this decade is out.

The General Accounting Office, whose representatives will testify immediately after me, has produced a study which notes that almost one-half of America's For-

tune 500 companies now do some drug testing of their employees. Studies over the past 5 years have shown dramatic 10% annual increases in the number of firms doing drug testing and there is little doubt that this rush to drug test will not diminish in the future.

This drug testing stampede is an attempt to respond to a real problem in American life, the crisis of drug abuse. But in seeking to combat drugs, we cannot trample on the rights and lives of the American worker. You will hear testimony today from a courageous woman, Ms. Juanita Jones, who was the subject of an inaccurate and arbitrary drug test by the District of Columbia. Because of an incorrect lab report, this law-abiding, model employee was fired without any notice and she suffered for two years as an outcast from her church and community. It is worth pointing out that though she was able to defend her good name in a court of law, had she been a private employee she would have had no such recourse.

I believe it is time that Congress takes up the subject of private drug testing in a serious and comprehensive fashion. There are too many workers who are being subjected to bad tests, improper procedures, and a profound lack of legal protection in the workplace.

My bill, the Employees Drug Testing Protection Act, is an attempt to set down as law some of the most basic guidelines by which any company should be willing to abide. The bill prohibits the use of random drug tests except in "drug-sensitive occupations", requires the use of the more accurate gas chromatography mass spectrometry method to confirm any positive drug test, and guarantees the employee certain rights of access and review of drug test information.

I am more than willing to admit that this bill represents simply a starting point for the debate on regulating drug testing. Since it was originally drafted, many organizations have come to me with excellent suggestions for building into the bill clearer rights for employee appeals and for providing the option of rehabilitation. I am all for taking the lessons of our best run unions and companies and incorporating them into a comprehensive federal statute.

But I suggest to this Committee that the time to regulate drug testing is now. Those companies which are doing tests recklessly and without proper guidelines do not only ruin the lives of their employees—though an incorrect drug test with no chance for appeal can swiftly destroy a career and a family. An improper drug test also casts a pall of illegitimacy over our attempts to prevent drug abuse, and disgraces the concept of our country as a nation of laws and fairness.

H.R. 691: Employee Drug Testing Protection Act

The Schumer bill has three essential elements:

1. Bans random drug testing for employees and applicants to jobs unless:

A. They are in drug sensitive occupations. That is it could damage the public health or safety.

B. Otherwise employees can only be treated for probable cause.

2. Requires the use of the most accurate, gas chromatography mass spectrometry method of confirm any positive test.

3. Gives broad employee access to their own testing records.

Mr. Martinez. Congressman Schumer, one of the things that the unions are adamant about in their opposition to drug testing is what they envision as a better program, one of employee assistance. They call them EAP's (Employee Assistance Programs).

Where they are used, they have shown great result—higher productivity, and in fact a cost benefit to the employer, and sometimes amazingly not just a few dollars but a great number of dollars—since these people who are helped through these kinds of programs are not only more productive but they are not absent as much and they provide stable employment so the employer doesn't have to go out and rehire and retrain new personnel for that position. There seems to be a lot of benefit from that kind of a program.

Does your bill address the EAP alternative as a suggestion for employers? It appears the tendency is that if you have somebody who is a drug abuser you "Can him. Get rid of him." He's just a pain in the neck to you.

Mr. SCHUMER. Right.

Mr. MARTINEZ. But the more humanitarian approach would be to take this person and put him in one of these programs and help him. Because if we are going to eliminate drug abuse, the people to get started with are the people that are actually using the drugs, to get them off them.

You know, the President and the Administration has had a great campaign going on, "Just say no to drugs." Well, it doesn't work that way in reality, and there is a lot of peer pressures and there is a lot of pressures of life itself. Among young people, they get pulled into drugs and it's a tragic thing. We haven't done as much as we possibly can to stop drugs from either being manufactured in this country or coming into this country.

In fact, there is a war on drugs, and yesterday on the floor there was some discussion about it. One of the Members, one of our colleagues stated, "We declared war on drugs and immediately cut the money that provides the weapons to fight drugs, to fight the war."

So, it seems in Congress that we are saying we are going to fight drugs and we're going to do everything we can against drugs and then not provide the wherewithal to do it. We really hurt the people that are affected by the use of drugs because they lack the education to understand the harm that it's doing to them, and then because of circumstances beyond their control they lose their means of employment.

So, I guess the bottom-line question I am asking here is don't you think that somewhere in this whole process we ought to address the humanitarian side of it, assistance to these people in the workplace that are abusing drugs?

Mr. SCHUMER. I think, Mr. Chairman, you have made an excellent suggestion. This bill doesn't have an automatic rehabilitation provision in, but I think it's a good idea. When I introduced this bill, it was as a first step, a study bill, to get comments from all sides because the drug testing area is very controversial and there are lots of different views.

I believe that given the problems we have with drugs and the volatility of the issue, until we get some kind of consensus, which I believe this committee could lead in forging, we are not going to pass legislation.

But let me say this. I agree with your thrust. But what is the greatest resource America has, particularly as we move into the 21st century? It is not really the minerals under the earth or the soil on the ground, it's our people. And every time a worker is afflicted by drugs, we are wasting the greatest resource we have.

If we are going to remain the leading power of the world, again it is going to be because of our people. And every time someone goes on drugs, they are a wasted life that we need in our battle to remain a great economic power.

So, I think it is very important to have rehabilitation provisions in the bill. I am talking to several different groups about adding those to the bill and would welcome the committee to do the same in its endeavor because I think it's an extremely valid point.

Mr. MARTINEZ. Thank you, Mr. Schumer.

I agree with you totally that one of the greatest resources we have is human resources and that for too long in this country we have shunned it and tried to ignore the problems that exist, sweep them under the carpet—all the cliches one could use. We have actually been without any regard to the fact that if we are going to be a strong country, a strong nation, we have to have healthy, well educated people free from these kinds of troublesome problems.

I thank you, and you are to be commended for introducing this bill and bringing this debate to light so that we can start talking about how we're going to rectify this problem to a greater extent than just saying no to drugs.

We have just been joined by Mr. Jontz and Mr. Jeffords who is the ranking minority member of the Committee on Education and Labor and an ex-officio member of this subcommittee.

Mr. Jeffords, do you have an opening statement?

Mr. JEFFORDS. No, I do not, Mr. Chairman.

I just would also like to commend Congressman Schumer for getting us going on this very, very important aspect of the drug problem to see what is reasonable and responsible to do under the circumstances.

I have an open mind on just how far we should or shouldn't go, and your testimony has been very helpful in that regard, as well as the bill and your trying to prompt our attention as to what we may do.

There are so many different ramifications of mandatory drug testing that in some constitutional respects are somewhat frightening. On the other hand, the protection of the public and the seriousness of the drug issue make it necessary for us to really take a close look at it.

Mr. SCHUMER. Thank you, Mr. Jeffords.

Mr. JEFFORDS. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Jeffords.

Mr. Jontz, do you have an opening statement or comment?

Mr. JONTZ. I do not. I appreciate the opportunity to hear the witnesses this morning, and thank you, Mr. Chairman, for scheduling the hearing.

Mr. MARTINEZ. Thank you, Mr. Jontz.

Mr. Hayes, do you have any questions of the witness?

Mr. HAYES. No questions, Mr. Chairman.

I just want to add my word of commendation for our colleague for introducing this first-step legislation to protect the rights of working people. I think that as we proceed to make this law, we might be able to strengthen it along the way with some amendments.

But I just want you to know that I am supportive of your position with respect to it and will do everything that I can to help pass it because some people are really being abused by this random testing. It's a good way to get rid of people sometimes.

Mr. SCHUMER. Yes.

Mr. HAYES. Thank you very much.

Mr. SCHUMER. Thank you.

Mr. MARTINEZ. Thank you, Mr. Hayes.

Mr. Schumer, I am going to invite you, if your schedule permits, to join the panel so that you might listen to the other witnesses'

testimony and ask questions if you have any, since it is your legislation.

Mr. SCHUMER. I most appreciate that opportunity, and I thank the committee for their consideration.

Mr. MARTINEZ. Thank you, Mr. Schumer.

Our next witness is L. Nye Stevens, associate director, General Government Division, U.S. General Accounting Office.

We welcome you. Would you please take a seat, and we will hear from you immediately. Would you like to introduce the people who are with you?

STATEMENT OF L. NYE STEVENS, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY: ROBERT K. AUGHENBAUGH; AND THOMAS M. BEALL

Mr. STEVENS. Yes, I will, Mr. Chairman. Thank you very much for this opportunity to appear and testify today on the extended nature of employee drug testing in the private sector.

We believe that the recent review of surveys that we completed for Congressman Schumer provide for a useful background on the activities that would be affected by the legislation you are considering today.

Our report on this work has just been made available, and with your permission, what I will do is just summarize very quickly its major findings and then we will respond to whatever questions you have.

Mr. MARTINEZ. Your prepared statement will be inserted in its entirety following your oral presentation.

Mr. STEVENS. Thank you very much, Mr. Chairman.

Mr. MARTINEZ. You may summarize. Thank you.

Mr. STEVENS. I am accompanied today by the two auditors who were most responsible for this work: Robert Aughenbaugh, on my right, who is with the Norfolk regional office, the evaluator in charge of the study; Tom Beall, on my left, who is a member of our privacy group in the Washington headquarters, who also participated in it.

Now, our work involved the identification and review of ten percent surveys of mostly large and medium-size companies in the private sector on their drug testing practices and their plans for the future. The studies used a variety of methods. They have a highly variable number of response rates in them. But we believe that, taken as a whole, as a group, they provide an excellent and quite current description of contemporary drug testing practices. Let me very briefly summarize what the studies tell us.

Overall, they indicate that drug testing is a common but not yet universal private sector practice. It seems clear also that the larger a firm the more likely it is to have a drug testing program. The highest figures that we found were reported in the two studies that covered the largest companies in the country, the Fortune 500, about half of which are now testing for drugs.

The studies also provide a clear indication that drug testing is likely to become more prevalent in the future, since as many as a fifth of the companies that aren't already testing either employees

or applicants indicated that they are either considering or planning such a program.

One survey noted the concern that if the trend towards drug testing continues to grow as fast as it has, drug users may gravitate toward those companies that don't have any testing program and that other employers will have to follow suit as a matter of self-protection.

The surveys also suggest that firms with testing programs are more likely to test applicants for employment than their current employees. In one survey, the largest number of respondents we found testing at all was 55 percent, and they were testing applicants for employment rather than current employees.

With regard to the treatment of individuals who are tested for drugs, the surveys show that although they are generally in the minority, there are firms that do not provide any kind of a confirmatory test for those who fail the first screening for drugs. Of course, the Schumer bill that you have before you would require confirmatory tests. That is one of its features.

In two of the three surveys that specifically reported on retesting of applicants after a first test, less than half the firms said that they did provide follow-up testing for job applicants who failed an initial test; they just let them go.

There are also firms reporting that they do not even tell applicants that the reason they are not hired for a job was that they failed the drug test, had a positive drug test.

Now, who receives drug testing and why: Among the firms that tested employees now, the majority said that they did so for cause, such as after an accident, and that was the reason they cited for testing. As one of the surveys noted, this is less controversial because it has the support of the courts. There is not as much danger of a legal battle in it.

To a lesser extent, firms used random or periodic testing of their employees. We didn't find any survey that said more than about a quarter of the companies are doing that. That is, of course, what the Federal Government is proposing for its workforce.

Five of the surveys noted the reasons why companies adopted a testing program, and you mentioned some of those in your opening statement, Mr. Chairman. They cited improving workplace safety, increasing productivity, curbing illegal drug traffic, and reducing employee medical costs.

The firms that didn't test also had reasons, and they cited some reservations about the costs and reliability of the tests. They included the ethical and moral implications of the process. And some of them expressed doubts that even if an employee did have a confirmed drug test, it didn't necessarily indicate an impairment on the job.

One survey asked companies engaged in drug testing if they had a written policy on their drug testing programs. And while a majority of the firms said that they either had a written policy or were in the process of writing one to cover it, 14 percent of the respondents indicated that they didn't have any written policy or guidelines or even any plans to develop them.

This suggests that although they are the minority, some firms operate without written formal procedures describing their drug testing programs.

That is a summary of what we have done so far, Mr. Chairman.

I might take a moment to mention also that at Congressman Schumer's request we are doing some follow-up work that has to do with the reliability of the laboratories and the State regulation of laboratories that will carry out these drug tests. As drug testing spreads, of course, the reliability of the lab work would become increasingly controversial.

In this work, we plan to survey all 50 of the States to determine the regulatory controls that they have over drug testing labs, and we will look, among other things, at the licensing requirements, the quality control standards, proficiency testing, personnel standards, and their state inspection programs.

That is work we are just beginning, and it will also be under Mr. Aughenbaugh's direction.

That is a short summary of a good deal of data, and if you have any questions on the statement or the report, we will be glad to respond to them.

[The prepared statement of L. Nye Stevens follows:]

United States General Accounting Office

GAO Testimony

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Employee Drug Testing

Statement of
L. Nye Stevens, Associate Director
General Government Division

Before the
Subcommittee on Employment Opportunities
Committee on Education and Labor
House of Representatives

GAO\T-GGD-88-14

EMPLOYEE DRUG TESTING

SUMMARY OF STATEMENT BY
L. NYE STEVENS
ASSOCIATE DIRECTOR
GENERAL GOVERNMENT DIVISION

In response to a request by Congressman Charles E. Schumer, GAO obtained and reviewed 10 surveys on private sector drug testing. GAO's objective was to summarize the information in these surveys concerning the extent and nature of employee drug testing in the private sector.

On the basis of the available survey data and pattern of response across surveys, GAO believes some summary observations can be made about private sector drug testing as practiced by survey respondents. The survey data indicate that:

-- drug testing is a common, but not universal private sector practice;

-- firms are more likely to test applicants than employees;

-- larger firms, as measured by the number of employees, are more likely to drug test; and

-- more firms plan to implement drug testing in the future.

Regarding the treatment of individuals subjected to drug testing, the surveys show that, although they are generally in the minority, there are firms that:

-- do not provide confirmatory tests to employees or applicants who initially test positive,

-- retest employees or applicants using the same type of test as that used initially, and

-- do not tell applicants that the reason they are not hired was because of a positive drug test.

For a number of methodological and statistical reasons, the survey results should not be considered a statistically valid, representative sample of the population of businesses nationwide. The data from the surveys are only indicative of the drug testing practices reported by the firms that responded.

Mr. Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to testify on the extent and nature of employee drug testing in the private sector. Inasmuch as H.R. 691 would apply to private sector drug testing programs, we believe this testimony will provide a useful characterization of the existing programs that could be affected by the proposed legislation.

At the request of Congressman Schumer, we reviewed recent surveys on private sector drug testing. Our report entitled Employee Drug Testing: Information on Private Sector Programs (GAO/GGD-88-32, March 2, 1988) summarizes the information contained in the individual survey reports and relates it to some of Congressman Schumer's specific concerns about private sector drug testing practices.

Results in brief

Overall, the surveys indicate that drug testing is a common, but not universal private sector practice and that drug testing may become more common in the future. The surveys also suggest that larger firms, in terms of the number of persons employed, are more likely to drug test and that firms with testing programs are more likely to test applicants than employees.

With regard to the treatment of individuals who are drug tested, the surveys show that, although they are generally in the minority, there are firms that do not provide confirmatory tests to employees or applicants who initially test positive. There are also firms reporting that they do not tell applicants that the reason they were not hired was because of a positive drug test.

Before providing further details in support of these observations and additional survey information, we will briefly describe the surveys used and mention some of the methodological qualifications that need to be kept in mind concerning this survey data.

Overview of the surveys

To identify and obtain the most recent surveys on drug testing policies and practices in the private sector, we searched 14 computerized bibliographic files. We also discussed our information needs with representatives of over 35 public and private organizations knowledgeable about drug testing practices. In the end, we identified 12 surveys with items on drug testing. However, we considered only 10 surveys usable for our purposes.

In general, large and medium sized firms--as measured by the number of employees--responded to the surveys. Roughly half or more of the firms responding to five of the surveys said that they employed over 500 persons. Three other surveys characterized the responding firms as among the nation's largest business organizations. For example, one survey focused only on Fortune 100 firms, which in 1987 employed a total of about 8.5 million people.

The data from these surveys are reasonably current. Of the 10 surveys, 5 were published in 1987, 4 in 1986, and 1 in 1985. The primary purpose of most of the surveys was to obtain information about drug testing, or workplace drug abuse which included drug testing.

The number of firms being surveyed ranged from a low of 100 in one survey to a high of approximately 35,000 in another. The percent of surveys returned ranged from less than 1 percent to 100 percent. The actual number of respondents providing information ranged from a low of 60 in one survey to a high of over 1,900 in another.

Interpreting survey results

Before discussing the survey results, certain qualifications must be made concerning the use and interpretation of the data. For a number of methodological and statistical reasons which are detailed in our report, the survey results should not be averaged or considered a statistically valid, representative sample of the population of businesses nationwide.

For most of the surveys, certain limitations, such as low response rates and selective samples, preclude projecting the results beyond the group of businesses that actually responded to the surveys.

Despite these restrictions, we believe these surveys are a useful source of information about private sector drug testing. The figures obtained from the surveys are indicative of the drug testing practices reported by the firms that responded. This constitutes a large number of corporations reflecting a broad cross section of the nation's businesses.

The extent of drug testing

All 10 surveys provided some information on the prevalence of testing, and almost all the surveys differentiated between programs for employees and those for applicants. The results

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indicate that across the surveys a number of the responding companies, though not a majority, had drug testing programs. The highest figures were reported in two surveys that focused on some of the nation's largest companies. Roughly half the respondents to these two surveys indicated that they had a testing program. At the low end of the spectrum, another survey said that only 9 percent of the responding firms had an employee drug testing program.

The majority of surveys also showed that firms were more likely to test applicants than employees. In one survey, 55 percent of the respondents said that they tested applicants. This was the highest percentage reported across all surveys concerning the extent of drug testing.

The surveys indicated that larger organizations were more likely to have drug testing programs. For example, in one of the surveys only 16 percent of the firms with less than 500 employees had drug testing programs while 36 percent of the firms with 5,000 or more employees had testing programs. Four of the surveys looked at the percent of firms testing for drugs relative to their number of employees. All four surveys showed that a greater percentage of the largest firms have testing programs.

The surveys also suggest that drug testing may become more common. A number of firms that were not testing at the time of the survey said they were planning to do so in the foreseeable future. The lowest figure reported across surveys for firms planning to test was 3 percent while the highest figure reported was 20 percent. One survey noted a concern that if the trend toward drug testing continues, drug users may gravitate to those organizations known not to test and that other employers will have to follow suit as a matter of self-protection.

The testing methods most often used

In all five of the surveys that inquired about drug testing methods, the majority of survey respondents reported urinalysis as the method they used. In those surveys that asked about who performs the testing, the majority of firms reported using independent laboratories.

Seven of the surveys raised the question of confirming initial positive tests with a second test. Although the majority of firms in five of the surveys said they performed some kind of retest, performing a confirmatory retest was not a universal practice. Less than half the firms reported retesting in the other two surveys.

Further, it appears that retesting was less common for applicants than for employees. In two of the three surveys that specifically reported on retesting of applicants, less than half of the firms said that they provided follow-up testing for job applicants who failed an initial test.

Three surveys made the distinctions among the following: 1) retesting with some other confirmatory test, 2) retesting with the same type of test as the initial test, and 3) no retesting. Although more firms reported retesting with some other type of urinalysis test, there were firms reporting that they used the same test. Other confirming tests included some that were more sophisticated, such as one of several chromatography urine tests.

Who receives drug testing and why

Among firms that tested employees, the majority of firms cited testing for cause, such as after an accident, as the reason for testing. As one survey noted, this type of testing may be prevalent because it is less controversial and has support in the courts.

To a lesser extent, firms used random or periodic testing for employees. The percent of firms reporting they did random testing ranged from 23 percent to 10 percent across the seven surveys providing information on this type of testing. It appears that testing for selected jobs, such as those involving safety, is more common than random testing, but only two surveys provided figures on this form of employee drug testing. In these surveys, 38 percent and 34 percent of the firms reported testing for selected jobs.

All six of the surveys reporting on the types of applicants tested indicated that among firms testing applicants, it was more common to test all applicants. Across these surveys, 79 percent to 94 percent of the firms that screen for drugs said that they tested all applicants.

Reasons for having and not having drug testing programs

Five surveys noted respondents' reasons for having a drug testing program. Among the reasons often cited for drug testing were improving workplace safety, increasing productivity, curbing illegal drug traffic, and reducing employee medical costs. Firms that did not test generally cited reservations about the costs and reliability of drug testing as well as the ethical and moral implications of the process. Other concerns included employee opposition, legal implications, and some doubts among a few

responding firms that if an employee took drugs, and the test showed that drugs were present in the body, it would not necessarily indicate job impairment.

What happens to those individuals testing positive

In the seven surveys that asked about the various actions taken when an applicant tested positive for drugs, the majority of firms said that they would not hire job applicants who failed drug testing. However, a number of firms also indicated that they would allow reapplication later. Across the three surveys reporting figures on reapplication, the percent of firms indicating they would allow reapplication ranged from 30 to 79 percent. Some firms noted that reapplication may be contingent on such factors as a negative retest, passage of a specified time period, or evidence of rehabilitation. Two surveys reported that the majority of firms would not consider an applicant if the candidate refused drug testing.

There were more firms that said they would tell applicants testing positive why they were not being hired than firms that would not explain the reason for rejection. Across the four surveys addressing this issue, between 2 and 25 percent of respondents indicated they would not tell applicants the reason for rejection.

In all five of the surveys asking about employees who tested positive, the majority of firms indicated a preference for rehabilitation rather than dismissal. Across the surveys, between 52 and 89 percent of responding firms said that they would refer an employee to a rehabilitative program. Two of the surveys noted that the choice or combination of actions would be determined on a case-by-case basis for employees who tested positive. One survey noted that termination is often the final outcome, but warnings or suspensions were also frequent alternatives, particularly for the first offense.

A written drug testing policy can inform managers and employees of company procedures for dealing with drug use. One survey asked companies engaging in drug testing if they had a written policy on drug testing. While the majority of firms said that they had either a written policy or were in the process of writing one, 14 percent of the respondents who drug test indicated that they had no written policy or plans to develop one. This suggests that, although they are a minority, some firms operate without written, formal procedures describing their drug testing program or procedures.

GAO work in progress

Mr. Chairman, this concludes my overview of the information contained in the surveys we reviewed. Before completing my statement, however, I would like to briefly describe a related project we have underway, also at the request of Congressman Schumer. This work will examine the degree to which states regulate laboratories that analyze drug test samples.

As you know, one of the prime concerns regarding employee drug testing is the ability to ensure accurate test results. This concern becomes more important when one considers that as more private sector firms implement drug testing, more commercial laboratories may become involved in analyzing the specimens. The quality and competence of these laboratories have a direct bearing on the accuracy of test results.

We plan to survey the 50 states next month to determine the regulatory controls over drug testing laboratories. Among other things, we will look at licensing requirements, quality control standards, proficiency testing requirements, personnel standards, and state inspection programs.

We have already identified some inconsistencies between states. As part of the process of developing our survey questionnaire we contacted officials in 34 states by telephone and obtained some preliminary information. In 21 of the 34 states contacted, laboratories must be licensed or approved by meeting specific laboratory requirements. Requirements in six of these 21 states include fairness standards and privacy rights for the individual. Thirteen of the states we contacted, however, do not have standards or regulations that laboratories are required to meet, although four currently have drug testing proposals pending in their state legislatures. We will explore these differences in greater detail as our work progresses.

We have also noted that under certain circumstances, laboratories do have to meet minimum federal requirements, such as when testing Medicare patients or military personnel, or when engaging in interstate commerce. However, when testing private sector employees, only the Clinical Laboratory Improvement Act (CLIA), a federal law covering laboratories that do interstate testing, would apply. CLIA standards include personnel qualifications, quality control procedures, record keeping and equipment requirements, and assurances of an acceptable external proficiency test program.

Laboratories that do not test Medicare patients, the military, or public sector employees, and operate solely within one state, do not fall under any federal laws. Based on our preliminary information, we note that some laboratories in approximately a third of the 34 states we contacted are unregulated at the federal or state level.

This concludes my comments, I would be pleased to answer questions.

Mr. MARTINEZ. Since we do have a general vote on right now I am wondering, if the Members wanted to recess at this particular time before starting into the questioning which would give us ample time to question without being interrupted. Please bear with us and wait until we come back.

Mr. STEVENS. We would be glad to, Mr. Chairman.

Mr. MARTINEZ. We will return as soon as possible.

We are adjourned now for a short recess.

[Recess.]

Mr. MARTINEZ. We will go ahead and resume. We are back in session.

Let me start off the questioning by asking you this. One of the things that I would think is important to employers is information they probably should have compiled in conjunction with justifying the testing of employees, the cost factor—is drug abuse really costing them the loss that they feel it is so that they are justified to drug test.

Is there any comparison? Did you do any comparison of the cost benefit or lack thereof between the companies that did do drug testing and the companies that didn't?

Mr. STEVENS. Some of the studies, Mr. Chairman, did address that question. But what they got back was primarily anecdotal information, nothing very specific. I mean, nobody was able to put a quantification on either the benefits or the costs of drug testing. They talked about an improved workforce morale and that sort of thing. But it was nothing that could be quantified or that, in our view, would have methodological substance to it.

Mr. MARTINEZ. So, actually, there is no degree of accurate financial documentation of loss?

Mr. STEVENS. No, sir, not in these studies.

Mr. AUGHENBAUGH. We have found out, though, in discussions with a major laboratory that the higher the possibility that there will be a large number of people testing positive, the higher the cost that will be charged to the corporation requesting the laboratory to test.

They pretty well have an idea, based on the type of industry that the firm is in, how many people will eventually test positive. And they pretty much skew their bid to compensate themselves for the high cost of doing those tests.

Mr. MARTINEZ. I see.

Have any of the companies that are doing the drug testing thought or even considered what happens, for example, in the case of Juanita Jones, when they get sued because it was unjustly and wrongly done? You know, there are many times that we are prescribed certain kinds of drugs by a doctor for certain illnesses and those residues may show up in a drug test, and that doesn't make us a drug addict or a drug abuser.

Haven't employers realized that one of the important aspects, as was indicated by Mr. Stevens, is there is no follow-up, in many cases, on the initial test even though we know that many of the less expensive tests are not accurate? There is one test that is more accurate than the others, and even that is not 100 percent fullproof, it just does more to erase any doubt.

In consideration of the things that I talked about—that there might be something other than drug abuse—without giving the person another test to confirm, employers leave themselves open for a lawsuit.

I would think that requirements in Mr. Schumer's bill, would safeguard employers, and this would be a beneficial piece of legislation for them.

Do you have any comment on that?

Mr. STEVENS. Yes, sir, a couple of comments.

One, you will remember that a lot of these companies are testing applicants rather than employees, and it is easier for them to kiss off somebody who wants a job because there are plenty of other people to stand in for them than it is to take their present employees.

Among present employees, also, they are generally still a majority of them testing only for cause. Now, I think that Ms. Jones, as I understand, would be in a health and safety type occupation where that might apply.

But the proportion who are doing the random or periodic testing, just anybody in the company is eligible, is really still much smaller than those who are doing it on a more selective basis or who are doing it for all applicants rather than employees themselves.

Mr. MARTINEZ. Do you know if there are any States now that ban drug testing or regulate it at all?

Mr. AUGHENBAUGH. We have done a little bit of work—it's very preliminary—on the laboratories themselves, and as part of it we have been looking at any statutes or regulations that involve drug testing on a state-by-state basis. We have done work now in 34 states; 21 states have regulations of some sort, whether they be statutes or maybe just regulations that are a part of, say, the health department or the department of labor within that State.

But we have not completed our work. We have a questionnaire, as Mr. Stevens pointed out, that is going out to all 50 States. After that information has been obtained from them, we will have more accurate and complete information on exactly what each State is doing with the laboratories and to a certain extent with the corporations within those States.

Mr. MARTINEZ. Well, can we get that information as soon as it is available?

Mr. AUGHENBAUGH. Absolutely.

Mr. MARTINEZ. Thank you.

As to the States that are regulating drug testing, why are they doing it? Did you get any idea?

Mr. STEVENS. I would assume, Mr. Chairman, that the same pressure are operating at that level as they are at the Federal level, and there is a good deal of attention to the quality of the workforce. I think one of the reasons why there may be more attention paid to bills like Mr. Schumer's bill might very well be that if the states do begin to regulate and become more active and do different things among themselves, the employers themselves might find some advantage to having some uniformity, particularly those with large, nationwide workforces.

Mr. MARTINEZ. Just a couple more questions. Was there any information from insurance companies with whom these companies

carry insurance on many of their losses, relating to the loss caused by drug abuse?

Mr. STEVENS. Not in these studies that we looked at, Mr. Chairman, no.

Mr. AUGHENBAUGH. We have found that in almost all cases the insurance companies are exempt from any laws or statutes, regulations, whatever, within any of the States where we have found any of these types of regulations.

Mr. MARTINEZ. When you say exempt, that means that payment was invalid?

Mr. AUGHENBAUGH. Insurance companies have a lot of tests done on the people that they are going to issue policies on, and although they do have a large number of tests done, they are not regulated in any way.

Mr. MARTINEZ. My last question is did you delve into the effectiveness of employee assistance programs as to what they actually save the companies rather than just drug testing and firing?

Mr. STEVENS. Not the effectiveness. We confirmed that some companies do refer, do use the results of the drug tests to refer employees to assistance programs. But remember, again an awful lot of this is taking place among applicants, and the easiest thing for the company to do there is just to not even bother with a confirmation, perhaps not tell the employee or the applicant that the reason he hasn't been hired is the drug test, and certainly not to devote any resources to rehabilitation. The company has no responsibility towards that.

Mr. MARTINEZ. Isn't the company being kind of shortsighted there? You know, the person could be on some kind of medication but the company is automatically assuming this is a drug abuser and we don't want him. Yet, he may be a very talented individual who could be very productive for that company. Wouldn't you think they are being a little shortsighted by their assumption?

Mr. STEVENS. It would be easy to discern that.

On a cost basis, the confirmatory tests are much more expensive, much more sophisticated and therefore much more expensive than the screening tests. I would think that only in an industry where there were many more applicants than people the company could actually hire would that become a real consideration. But the studies we have didn't really address that.

Mr. MARTINEZ. Thank you.

We have just been joined by Mr. Gunderson, the ranking minority member.

Mr. GUNDERSON. No questions, Mr. Chairman.

Mr. MARTINEZ. No questions.

Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

Again, let me thank the committee for allowing me to ask some questions and sit in.

My first question to the panel is, over the last few years, what kind of increase has there been in the number of companies beginning drug testing programs?

Mr. STEVENS. A couple of studies have come through just since the work we've done has been completed. I think there we are find-

ing 10 to 20 percent just in the past year or so, 10 to 20 percentage points increase.

Mr. SCHUMER. Increase.

Mr. STEVENS. In studies that were updates of ones that have been done before.

A second indicator, and perhaps more important, is that when we asked or when the surveys asked companies what their plans for the future were, we found as many as a quarter who didn't now have any kind of drug testing programs saying they intended to put one together, or "At least we're considering it."

So, that is an indication to me which confirms that the practice is likely to increase.

Mr. SCHUMER. All right.

I have some numbers here that say that in 1985 a survey of the Fortune 500 show 18 percent did some program, a new survey shows 49 percent. So, that's a pretty dramatic increase. And you say it's going to keep going up further.

Mr. STEVENS. Yes.

Mr. SCHUMER. Right.

All right. The second one is what is the number of companies that require a positive test to be confirmed by a second confirmatory test? The reason we ask that—and I know that the chairman has focused on that too—the initial test which they usually give is cheap and inaccurate. The second test is accurate but very expensive. So, of companies are giving the first test, you are going to find one, two, three, four, five out of a hundred, as many as one in twenty people being labeled a drug user even if they've never used drugs at all, in addition to people who might have had a sesame seed roll or something like that the day before.

One, how important is it that they give a second test for accuracy; and second, what number of companies do use the second test for both applicants and for employees?

Mr. STEVENS. It is very important that there be a confirmation because of the prevalence of false positives on the screening tests. It is basically a screening test and it is cheap.

Now, the number of companies who claim to give confirmatory tests is about half. It varies from employees to applicants. They are much less likely to do so among applicants. But one of the problems is that they very often use just the same screening test on the same sample for confirmation.

Mr. SCHUMER. Oh.

Mr. STEVENS. And given some of the chemical properties, this can result in another false positive.

Mr. SCHUMER. Right.

Mr. STEVENS. It is, in our view, important that companies, when they use a confirmation, use a different type test, something more sophisticated than the simple screening device.

Mr. SCHUMER. Right. And that is an interesting point. So, even those that do confirmations are using the cheap test the second time and it could come up with the same false positive, as they say.

Mr. STEVENS. Right.

Mr. SCHUMER. I take it, as you mentioned, for applicants the number of firms giving second tests is even fewer. So, they could

just say, "Hey, we didn't hire you because we don't like people who wear blue shoes or something," and out you go.

Mr. STEVENS. Yes.

Mr. SCHUMER. Okay.

Mr. AUGHENBAUGH. Mr. Schumer.

Mr. SCHUMER. Go ahead.

Mr. AUGHENBAUGH. With the work that we are currently doing with the laboratories as it relates to the laws and regulations in the states, of the 21 states that we have preliminary information on that do have regulations, 8 of them require that the laboratories in their states use a confirmatory test. I believe 7 of those require that it be the GCMS, which is really the better.

Now, that does leave, just in our quick look, 13 of the 21 that have regulations don't require a follow-up, and also it leave the other states of the 34 in our quick look that don't require anything at all.

Mr. SCHUMER. Right, and as I understand your testimony, there are 10 states that have no regulation at all of the laboratories, is that right?

Mr. AUGHENBAUGH. Actually, we have 13.

Mr. SCHUMER. You said 13?

Mr. AUGHENBAUGH. That have no regulations.

Mr. SCHUMER. So, in those 13 states, the laboratory could be just randomly spitting out results; they could just throw darts at a board and say positive, negative, positive, negative, and the employee, if he's private sector, would have no resource at all? Is that fair to say?

Mr. AUGHENBAUGH. Unless they are involved interstate commerce. The laboratory would then fall under the CLEA act. But if they are solely working within the state, they would not be under any regulations.

Mr. SCHUMER. Thank you.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Schumer.

We thank you again for appearing before us and giving your excellent testimony.

Our next witnesses consist of a panel. The first is Juanita Jones, bus driver, District of Columbia Public School System; accompanied by David Soley, her attorney.

We also have Dr. S. Joseph Mulé, director of New York State Division of Substance Abuse Services Testing and Research Laboratory; and Dr. Arthur McBay, chief toxicologist, office of Chief Medical Examiner, State of North Carolina.

Mr. Soley, did we pronounce your name correctly?

Mr. SOLEY. It's Soley, Mr. Chairman.

Mr. MARTINEZ. Soley. Very good.

We will begin with you, Ms. Jones. Would you like to begin?

STATEMENT OF JUANITA JONES, BUS DRIVER, DISTRICT OF COLUMBIA PUBLIC SCHOOL SYSTEM; ACCOMPANIED BY DAVID SOLEY, DAVID & HAGNER, P.C.

Ms. JONES. Good morning, Mr. Chairman, members of the House Education and Labor Subcommittee on Employment. My name is Juanita Jones, and I am 52 years of age. I have four grandchildren.

Mr. MARTINEZ. Would you bring the microphone toward you? There you go. Thank you.

Ms. JONES. My name is Juanita Jones. I am 52 years of age. I am a grandmother of four grandchildren. I am employed by the D.C. Public School System Transportation Department for the Handicapped. I have been employed since February 5, 1981. And I was a victim of random testing. I was called in and was put on a bus over to Bennington Heights Clinic for testing, and I had a urine test, and it was tested positive for drugs, which I wasn't guilty of.

I came back maybe 3 or 4 days later I was called into the office, and they told me I was being terminated. I said, "Why?" And they said because we found marijuana in your urine. I said, "It must be a joke." They said, "It's not no joke." I said, "Stop kidding." They said, "No, we are not kidding. We found marijuana in your urine."

I said, "I never used marijuana. I am not a drug user, and I am not going to be labeled, I would hate to be labeled as a drug user." He said to me, "You go punch your time card out and go home, and 3 or 4 days you will hear from us and then you come back to my office."

But I never did go back. I found other ways of dealing with them.

[The prepared statement of Juanita M. Jones follows:]

STATEMENT OF
JUANITA M. JONES
BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
ON BILL H.R. 691
THE "EMPLOYEE DRUG TESTING PROTECTION ACT"
APRIL 21, 1988

Good morning Mr. Chairman and members of the House Education and Labor Subcommittee on Employment Opportunities. Thank you for this opportunity to speak on Bill H.R. 691, the "Employee Drug Testing Protection Act."

I am a 51 year old grandmother of four and have, since February 5, 1981, been an school bus attendant with the District of Columbia Public School System. My job as a school bus attendant is to love and care for the physically and mentally handicapped children who ride the school bus to and from school. I take my job very seriously and stay far away from any and all activities involving illegal drug use. Despite these facts, I was summarily fired from my job based on a drug test which erroneously indicated past use of marijuana.

I have now been reinstated to my job as a school bus attendant, as a result of a suit which I brought in federal court. I hold no ill-will against the School System. My case, however, illustrates the frightening injustice that can be perpetrated upon a citizen who is compelled to provide a urine sample for drug screening without any reason to suspect that the individual uses drugs. After being fired, I was denied any meaningful opportunity to challenge the erroneous drug test or to present my position in person to School System officials. Having been wrongfully branded as a drug user, I was humiliated and had difficulty finding employment until the U.S. District Court ordered my reinstatement. In the meantime, I lost my closest friends, and, for years, was considered a drug user by my neighbors and by the congregants at my church.

I recognize that drug abuse is a serious problem in our society, and that employers have a vital interest in ensuring the safety and well-being of employees. These laudable ends, however, cannot justify the means which many employers, through drug tests, have adopted to address these concerns.

The evils that can result from an ill-conceived drug testing program are well illustrated by the undisputed facts in my case. As a school bus attendant with an exemplary record, I was one of hundreds of Transportation Branch employees arbitrarily ordered by the School System to submit a sample of urine to be analyzed for traces of illicit drugs -- despite the fact that the School System had absolutely no reason to believe that I had ever used, possessed, or been under the influence of any controlled substances. The urine samples of myself and other employees were then analyzed by a preliminary drug screening process. In spite of the recommendations of the test's manufacturer, the Food and Drug Administration, and authoritative scientific articles, my employer failed to confirm positive results of these preliminary tests with an independent, alternative testing technique. Nonetheless, I was summarily dismissed solely on the basis of these unconfirmed test results. All of my attempts to obtain a hearing after my termination, with the right to be accompanied by counsel, to present live evidence, and to cross-examine witnesses, were denied. It was not until one and a half years after my termination that I was vindicated by the United States District Court, which recognized the absurdity and unfairness of my employer's drug testing program and ordered that I be immediately reinstated with full back pay. See Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).

The unfairness of my termination can be clearly viewed in light of my employment record, the severe flaws in my employer's drug testing program, and the harm that has been done to me. I originally joined the District of Columbia Public School System as a school bus attendant on February 5, 1981. My job, which never involved driving or being in charge of a school bus, was making sure that my schoolchildren were properly seated, and assisting the bus driver in maintaining order and decorum on the way to and from school. I took pride in my job and excelled in my performance. I reported to work regularly and promptly, and consistently received excellent ratings from my supervisors (see attached evaluations). Many of the parents of the children I assisted wrote letters praising my performance (see attached letters or praise).

My accomplishments with the children I attended to on my school bus route are well illustrated by a few of the multitude of complimentary letters written by the parents of the handicapped children I assisted. According to a letter from Melissa Pullins:

> I would like to extend praise and plaudits to the staff on school bus route 117 to Bethesda, especially to Ms. Juanita Jones.

> attendant on that route, who extends the atmosphere of home from the front door to the school door.
>
> Ms. Jones is a surrogate mother to the children, making sure hats and mittens are on, tearful departures soothed, and a cheerful warmth maintained. These things are of special importance to these young people for whom a "good" or "bad" day could start with the quality of the ride to school. When she is not there, the day is not quite the same for my son.

In a letter from Dr. Alice O. Adams, Dr. Adams saluted these same qualities of a dedicated and caring school bus attendant:

> Mrs. Jones is an excellent attendant, in that she is polite and courteous and seems to have a sincere interest in her charges. She notes their behavior patterns and has kept us apprised of Sharon's behavior and never fails to let us know if she acts in an unusual or unacceptable way. This is the sort of thing that helps parents stay on top of problems. We really appreciate this and cannot express our thanks to Mrs. Jones enough. I think she goes beyond the call of duty to the extent that it should be recognized . . .

Similarly, the School System received the following letter from Lorraine McCrae:

> Mrs. Jones has done in my opinion an outstanding job while working with my son Calvin Hamption. Mrs. Jones seems to take the time to understand and listen to the children when they are having some type of problem or just plain want to talk. In the years that she has worked with my son he has grown very fond of her. Please extend my thanks and appreciation to Mrs. Jones and I look forward to working with her again in the coming school year.

As stated by Rita M. Johnson:

> Since Ms. Jones has transported my daughter for two years, since she began school, I'd like to particularly extend my appreciation to

her. Services provided well and pleasantly should not go unrecognized and unrewarded.

Despite this exceptional record, in August 1984, without any reason to believe that I used or possessed drugs, the School System subjected me to urinalysis screening for drug abuse.

The School System's drug testing program, which was newly adopted at the time, was based on a directive forbidding the use, possession, or being under the influence of alcohol or illegal drugs while on school premises. However, as my employer admitted in my court case, the specific test used to indicate whether an employee has been using marijuana is the Syva Company's EMIT Cannabinoid Urine Assay ("EMIT test"), which is incapable of determining whether an employee uses, possesses, or is under the influence of drugs at the time the test is administered. Instead, the EMIT test merely detects the presence of THC metabolites, the broken down by-product of the active ingredient in marijuana and hashish. As the District Court determined, the EMIT test cannot indicate when marijuana is absorbed by the body because THC metabolites can be retained in an individual's system for days and even weeks. Jones v. McKenzie, 628 F. Supp. 1500, 1503 (D.D.C. 1986). In fact, marijuana may be detected in the urine for as long as three weeks after being digested. In addition, as the District Court found, the EMIT test cannot indicate whether marijuana was ingested by active use or as a result of passive inhalation in the presence of others who were smoking marijuana. Jones v. McKenzie, 628 F. Supp. at 1503. Thus, the EMIT test does not and cannot determine whether a School System employee is currently physically fit or able to perform his or her job.

In addition, urinalysis tests for drugs are often inaccurate. Syva Company, the manufacturer of the EMIT test, as well as the Food and Drug Administration and other scientific experts in the field, have repeatedly cautioned that the EMIT test is subject to a certain degree of inaccuracy and that preliminary results must be confirmed with an alternative testing technique if the test is relied on to make important decisions such as hiring or firing an employer. See Jones v. McKenzie, 628 F. Supp. at 1505-06. Nevertheless, many employers, as was the case for me, fail to confirm preliminary results and errors in the testing do occur.

Despite the fact, as my employer conceded, that it had no probable cause or even reasonable suspicion to believe that I ever used illicit drugs, I was herded into a bus with other employees and shipped to the Benning Heights Neighborhood

Health Clinic to wait my turn to provide a sample of urine. The nurse provided me with a plastic cup and ordered me to return it to her full of urine. Samples were not carefully labelled, and it would have been simple to switch urine specimens.

On August 16, 1984, I was informed that my test results were "positive" for marijuana and, solely based on this drug test, I was ordered to punch out my time card and not return to work. I was given no chance to defend myself before the decision to fire me was made.

My formal termination notice stated only that I was fired for violation of the School System drug testing directive, even though the School System admittedly had no evidence that I used, possessed, or was ever under the influence of drugs while on school premises. Immediately upon being dismissed, I voluntarily underwent another identical drug screen, because I knew the test had to be a mistake. The results of this second test confirmed that I did not use illegal drugs.

I appealed my termination and requested a hearing, including an opportunity to appear in person, with counsel, and to have the right to present live evidence, to have witnesses testify on my behalf, and to cross-examine opposing witnesses. These requests were refused and a limited written appeal was denied in November 1984.

As a result of my termination, I was branded before my co-workers, family, and community as a drug user. My best friend, wrongfully believing that I was a drug user, refused to speak to me. For over a year, I was unable to find another job, especially one which would involve caring for children. It was not until February 24, 1986, that the United States District Court vindicated me by ordering my immediate reinstatement with full back pay. At the same time, the District Court also issued injunctive relief which, among other things, enjoined my employer from again testing me without probable cause to believe that I was using, in possession of, or under the influence of illicit drugs, and issued the following rulings of law:

(1) That my employer violated my Fourth Amendment rights by subjecting me to a urinalysis test for drugs without probable cause, based on specific objective facts, to believe that I used, possessed, or was under the influence of illegal drugs;

(2) That I was fired arbitrarily and capriciously because the urinalysis test which was the sole basis for my termination was not properly confirmed; and

(3) That, in violation of my Fifth Amendment right to due process, I was not provided with adequate procedures, either before or after my termination, to confront the evidence against me and challenge the loss of my employment.

The School System appealed the portion of this Order enjoining it from subjecting me to a drug test in the absence of a probable cause to suspect drug use. The U.S. Court of Appeals heard my case on October 2, 1987 and, on November 17, 1987, ruled that the School System could only conduct random urinalysis tests where the following three conditions are satisfied: (1) the tests are administered only on employees whose duties have a direct impact on safety; (2) the testing is conducted as part of a routine, reasonably required, employment-related medical examination; and (3) the test employed is one that has a nexus to the employer's legitimate safety concerns, i.e., which tests for on-duty drug use. Jones v. McKenzie, 833 F.2d 335, 341 (D.C. Cir. 1987). The School System is now seeking to take this matter before the U.S. Supreme Court.

Although my battle to vindicate myself from the horrible stigma and loss of livelihood associated with testing positive for drugs is over, many others are less fortunate. Indeed, if I had not been fortunate enough to be a government employee, I would not have even had the opportunity to vindicate myself. Dragnet drug testing of employees, for whatever the reason, is wrong. It has caused great agony and suffering to me personally. I urge the Subcommittee to limit the abuses caused by such a gross and unregulated invasion of human dignity.

0581a

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA

Exhibit 1

Report of Performance Rating

(Prepare in Triplicate – Instructions on Reverse side)

Name of Employee	Title and Grade	Rating Period
JONES, JUANITA	Att'd. - WAE 3	4/1/81 - 3/31/82
Department/Bureau/Division/Branch, etc.	Employee Status	SSN
Div. of Logistical Support	Part Time - Perm.	579496230
Type of Report: Scheduled (X) Unscheduled ( )**	Rater Supervised Employee: From 4/1/81 To 3/31/82	Check one: Administrative ( ) Supervisory ( ) Planning ( ) All Others (X)

FACTORS FOR RATING

1. QUANTITY ☑
   - + Amount of Work
   - + Completion of Work on Schedule
2. QUALITY ☑
   - + Accuracy
   - + Neatness of Work Product
   - + Thoroughness
   - + Judgment
   - + Oral Expression
   - + Written Expression
3. WORK HABITS ☑
   - + Observance of Working Hours
   - + Attendance
   - + Observance of Rules Including Safety
   - + Economy of Time and Materials
   - + Compliance With Work Instructions
   - + Orderliness in Work
   - + Job Interest
   - + Initiative
   - + Resourcefulness
4. PERSONAL RELATIONS ☑
   - + Cooperation with Co-workers
   - + Dealing with the Public
   - + Personal Habits
5. ADAPTABILITY ☑
   - + Performance in New Situations
   - + Performance in Emergencies
6. SUPERVISION AND PLANNING ☑ (If performance for Supervisor)
   - N/A Planning Broad Programs
   - Adapting Work Program to Broader or Narrower Programs
   - Devising Procedures
   - Laying Out Work and Establishing Standard of Performance for Subordinates
   - Directing, Reviewing and Checking Work of Subordinates
   - Instructing, Training and Developing Subordinates in work
   - Processing High Morale
   - Delegating Clearly Defined Authority to Act
   - Decision-Making Process
   - Determination and Utilization of Manpower and Materials
   - N/A Efforts to ensure EEO in all appropriate aspects of Recruitment, Hiring, Training, Promoting, Reassignment, etc.
7. OTHER (specify) ☐

TEMPORARY ASSIGNMENTS OUT OF JOB CLASSIFICATION

Inclusive Dates	Assignment/Duties Assisted	Rating

COMMENTS

Describe employee's strengths and deficiencies and include other comments. Comments MUST be made for Excellent or Satisfactory Ratings.

SEE ATTACHED

PERFORMANCE RATING ASSIGNED

(X) Outstanding ( ) Excellent ( ) Satisfactory ( ) Unsatisfactory

This rating is based on my personal knowledge and observation of the employee's performance.

This rating has been discussed with the employee.

Rater Signature: Janet Evans Date: 4-21-82

Employee Signature: Juanita Jones Date: 4/21/82

Reviewer Signature: Donald Anderson Date: 4-21-82

Approving Authority (O & U ratings) Signature: [illegible] Date: 4/29/82

DCPS Form 12

Office of Management Services — Division of Logistical Support

ADDENDUM TO COMMENTS CONTAINED IN REPORT OF PERFORMANCE RATING, PO FORM 12, FOR THE RATING PERIOD APRIL 1, 1981 THRU MARCH 31, 1982 ON MS. JUANITA JONES, WAE-1, BUS ATTENDANT.

1. Quantity -

   Amount of Work - has always been above par.

   Completion of Work on Schedule - has always been above the standard.

2. Quality -

   Accuracy - has always bee superior.

   Neatness of Work Product - has always been done in a manner rarely exhibited.

   Thoroughness - has always exceeded job requirements.

   Judgment - has always been above the norm.

   Oral Expression - has always been above the standard.

   Written Expression - has always been superior.

3. Work Habits -

   Observance of Working Hours - is always conscious of the working hours.

   Attendance - has always been superior.

   Observance of Rules Including Safety - is extremely observant of and complies with all rules.

   Economy of Time and Materials - is always effectively utilized.

   Compliance with Work Instructions - has always been above the standard.

   Orderliness in Work - has always been done in a manner rarely exhibited.

   Job Interest - has always been exceptional.

   Initiative - has always been superior.

Office of Management Services — Division of Logistical Support

ADDENDUM TO COMMENTS CONTAINED IN REPORT OF PERFORMANCE RATING, PO FORM 12, FOR THE RATING PERIOD APRIL 1, 1981 THRU MARCH 31, 1982 ON MS. JUANITA JONES, MAR-3, BUS ATTENDANT

Resourcefulness - has always been quite impressive.

4. Personal Relations -

Communication with Co-Workers - works extremely well with co-workers.

Dealing with The Public - is always polite, helpful and courteous.

Personal Habits - has always been impeccable.

5. Adaptability -

Performance in New Situations - has always been above par.

Performance in Emergencies - is always done in a manner rarely exhibited.

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA Rating I

Report of Performance Rating

(Prepare in Triplicate – Instructions on Reverse side)

Name of Employee	Title and Grade	Rating Period
Jones, Juanita	Asst. Supt. GS-13	April 11, 1982 - March 26, 1983
Organizational Segment, No.	Employee Status	SSN
Dir. of Logistical Support & Transp.	Part-Time Temp	578-48-6230
Type of Report: Annual ( ) Terminated ( )	Rater Supervised Employee From: 4-1-82 To: 3-31-83	Check one: Administrative ( ) Supervisory ( ) Planning ( ) All Others (✓)

FACTORS FOR RATING

1. QUANTITY ■
   - Amount of Work
   - Completion of Work on Schedule
2. QUALITY ■
   - Accuracy
   - Neatness of Work Product
   - Thoroughness
   - Judgment
   - Oral Expression
   - Written Expression
3. WORK HABITS ■
   - Observance of Working Hours
   - Attendance
   - Observance of Rules Including Safety
   - Economy of Time and Materials
   - Compliance With Work Instructions
   - Cooperation in Work
   - Job Interest
   - Initiative
   - Resourcefulness
4. PERSONAL RELATIONS ■
   - Cooperation with Co-workers
   - Dealing with the Public
   - Personal Habits
5. ADAPTABILITY ■
   - Performance in New Situations
   - Performance in Emergencies
6. SUPERVISION AND PLANNING ☐ (Effectiveness in:)
   - ____ Planning Broad Programs
   - ____ Adapting Work Program to Broader or Related Programs
   - ____ Devising Procedures
   - ____ Laying Out Work and Establishing Standard of Performance For Subordinates
   - ____ Directing, Reviewing and Checking Work of Subordinates
   - ____ Instructing, Training and Developing Subordinates in work
   - ____ Promoting High Morale
   - ____ Delegating Clearly Defined Authority to Act
   - ____ Decision-Making Process
   - ____ Determination and Utilization of Manpower and Materials
   - ____ Efforts to ensure EEO in all appropriate aspects of Recruitment, Hiring, Training, Promoting, Reorganizing, etc.
7. OTHER (specify) ☐
   - ____
   - ____
   - ____

TEMPORARY ASSIGNMENTS OUT OF JOB CLASSIFICATION

Inclusive Dates	Assignment/Duties Assumed	Rating

COMMENTS

Describe employee's strengths and deficiencies and include other comments. Comments MUST be made for Excellent or Satisfactory ratings.

Employee is an excellent employee who has all the abilities to be outstanding employee in the job performance.

PERFORMANCE RATING ASSIGNED

( ) Outstanding (✓) Excellent ( ) Satisfactory ( ) Below Average ( ) Unsatisfactory

This rating is based on my personal knowledge and observation of the employee's performance. This rating has been discussed with me.

Rater: Jerald Epstein Signature Date: 4-26-83 Employee: Juanita Jones Signature Date: 4-28-83

Reviewer: Thomas Anderson Signature Date: 4/29/83 Approving Authority (O & U ratings) Signature Date

DCPS Form 12 1-82000

V.N.H.

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA

Report of Performance Rating

(Prepare in Triplicate – Instructions on Reverse side)

Name of Employee	Title and Grade	Rating Period	
[illegible]	Asst Supt	4-1-83	3-31-84
Division, Branch, Unit or Location	Employing Duties	SSN	
Dir. Pupil Personnel Support Services	Same	578-48-6220	
I.D. # (Attached ☐ Unattached ☐)	Name Supervised Employee	Check One: Administrative ( ) Supervisory ( ) Planning ( ) All Others ( )	
	12-16 3-31-84		

FACTORS FOR RATING

1. QUANTITY ☒
   - E Amount of Work
   - E Completion of Work on Schedule
2. QUALITY ☒
   - E Accuracy
   - E Neatness of Work Product
   - E Thoroughness
   - E Judgment
   - E Oral Expression
   - E Written Expression
3. WORK HABITS ☒
   - E Observance of Working Hours
   - E Attendance
   - E Observance of Rules including Safety
   - E Economy of Time and Materials
   - E Compliance With Work Instructions
   - E Orderliness in Work
   - E Job Interest
   - E Initiative
   - E Resourcefulness
4. PERSONAL RELATIONS ☒
   - E Cooperation with Co-workers
   - E Dealing with the Public
   - E Personal Habits
5. ADAPTABILITY ☒
   - E Performance in New Situations
   - E Performance in Emergencies
6. SUPERVISION AND PLANNING ☐ (Effectiveness In:)
   - ___ Planning Broad Programs
   - ___ Adapting Work Program to Broader or Related Programs
   - ___ Devising Procedures
   - ___ Laying Out Work and Establishing Standard of Performance for Subordinates
   - ___ Directing, Reviewing and Checking Work of Subordinates
   - ___ Instructing, Training and Developing Subordinates in work
   - ___ Promoting High Morale
   - ___ Delegating Clearly Defined Authority to Aid
   - ___ Decision-Making Process
   - ___ Determination and Utilization of Manpower and Materials
   - ___ Efforts to ensure EEO in all appropriate aspects of Recruitment, Hiring, Training, Promoting, Reassignment, etc.
7. OTHER (specify) ☐
   - ___
   - ___
   - ___

TEMPORARY ASSIGNMENTS OUT OF JOB CLASSIFICATION

Inclusive Dates	Assignment/Duties Assumed	Rating

COMMENTS

Describe employee's strengths and deficiencies and include other comments. Comments MUST be made for Excellent or Satisfactory Ratings.

This employee has good potential and with a little [illegible] she could be total outstanding.

PERFORMANCE RATING ASSIGNED

( ) Outstanding (X) Excellent ( ) Satisfactory ( ) Below Average ( ) Unsatisfactory

This rating is based on my personal knowledge and observation of the employee's performance.

Rater: [illegible] Signature Date 3-29-84

This rating has been discussed with me.

Employee: [illegible] Signature Date 3/29/84

Reviewer: [illegible] Signature Date 4/2/84

Approving Authority (O & U ratings) _____ Signature Date _____

DCPS Form 12

Office of Management Services

Division of Logistical Support
TRANSPORTATION SECTION
2115 5TH ST., N.E.
WASHINGTON, D.C. 20002

May 6, 1983

MEMORANDUM TO: Ms. Juanita Jones, WAE-03, Bus Helper and
Mr. Richard Casey, WAE-07, Motor Vehicle Operator

SUBJECT: Letter of Appreciation

The attached letters from Ms. Nulissa Pullius, Ida Smith, Cheryl Shropshire and Dr. Alice Adams, parents of children that ride on your school bus extending their approval of your professionalism in dealing with their sons is accepted with a great deal of satisfaction. This is the second time this month that I have receive favorable correspondence on you. I again would like to express my appreciation on your outstanding performance and again for bringing accreditation to the Transportation Section and the entire District of Columbia Public Schools System.

My thanks for doing an outstanding job.

A copy of this correspondence will be placed in your official personnel file.

William C. French
Transportation Officer

WCF/ajr

cc: Mr. Wheeler
Official Personnel File
Work Jacket

April 13, 1983

Mr. William Trench
Transportation Unit
Old Public Schools
2115 3rd Street, NE
Washington, DC

Mr. Trench,

I would like to extend praise and plaudits to the staff on school bus route 17 to Takoma, especially to Mr. Jeannette Jones, attendant on that route, who extends the atmosphere of home from the front door to the school door.

Mr. Jones is a surrogate mother to the children, making sure hats and mittens are on, tearful departures soothed, and a cheerful warmth maintained. These things are of special importance to these young people for whom a "good" or "bad" day could start with the quality of the ride to school. When she is not there, the day is not quite the same for my son.

Please don't think of changing her to another route. The children, and the parents, do well, love and appreciate her. She is genuine!

Sincerely,
Melissa Sullivan

Mrs. Ida M. Smith
342 Nicholson St. NE
Washington, D.C. 20011
4-25-83

Dear Mr. French,

This is just a letter to express my appreciation for Mrs. Juanita Jones the bus attendant on Mr. Richard Carey B117 bus. My son Joseph Smith rides this bus to Christ Church school.

I've founded her to be very courteous above and beyond the call of duty. My son finds her friendliness a great start in making his day before school begins. I certainly hope that she would be considered to continue on this bus route for next year.

yours truly,
Mrs. Ida Smith

May 2, 1983

Dear Mr. French,

I would like to take the time to express my thanks and appreciation for the transportation service my son has received from Mr. Casey and Ms. Jones. They both are very courteous and helpful.

My son, Aaron Shropshire has a very long trip on the bus daily (at least 2 hours each way) and Ms. Jones tries to make his trip as pleasant as possible. His pick-up time is 7 AM. and they are very

prompt. If my son had to wait he would have become restless. Both Mr. Casey and Mr. Jones should be commended for their efforts.

Sincerely,

Cheryl W. Grosphie
3325 24th St. NE D.C. 20018

[redacted] daughter Shawn Adams is a p. singer in [redacted] bus # 8117, driven by Mr Richard Carey and Attended by Miss Juanita Jones

This letter is to Commend the driver And the Attendant for their services.

The bus has been Consistent As to timing And seems to have a perfect safety record.

Miss Jones is an Excellent Attendent, in that she is polite And Courteous And seems to have a sincere interest in her Charges. She Notes their behavior patterns And has kept us appraised of Shawn's behavior And Never fails to let us Know if she Acts in An unusual or unacceptable way. This is the sort of thing that helps parents stay on top of Problems. We really appreciate this And Cannot express our thanks to Mrs Jones enough. I think she goes beyond the Call of Duty to the Utmost And it should be recognized. Thanks for a safe And satisfactory transportation year And keep up the good work.

Sincerely
Dr Alicia A. Adams
5329 Kansas Ave. NW
Wash. DC 20011

Office of Management Services

Division of Logistical Support
TRANSPORTATION SECTION
2115 5TH ST., N.E.
WASHINGTON, D.C. 20002

March 28, 1983

MEMORANDUM TO: Mrs. Juanita Jones
WAE-03, Bus Helper

SUBJECT: Letter of Appreciation

The attached document sent to Mr.French from Ms. Rita M. Johnson, a parent of one of the student's that you transport is accepted with a great deal of satisfaction.

Mr. French, the Transportation Officer, is away on school business at the present time; however, I know that he will be proud of the professionalism that you have demonstrated. It is noted that this letter of appreciation from this parent is a result of you performing your duties in a manner that excells your subordinates. Not only does this reflect favorably on you but the Transportation Section and the entire School System.

My thanks for a job well done.

A copy of this memorandum will be placed in your official personnel file.

CLARK W. SCOTT
Assistant Transportation Officer

CWS/sjr

cc: Mr. French
Mr. Wheeler
Mr. Anderson
Official Personnel File
Work Jacket

MAR 23 1983

Rita M. Johnson
4126 Seventh Street, N. W.
Washington, D. C., 20011

Mr. William French
2115 Fifth Street, N. E.
Washington, D. C. 20002

Dear Mr. French:

I would like to take this opportunity to express and to bring attention to extraordinary transportation services of Ms. Jones and Mr. Casey. There is no way I can express my appreciation of services provided by these employees of the City.

In no small way, they contribute to my work day. My day begins with a warm greeting from them around 7:20 a.m., and I feel assured my daughter is in expert custody. Then around 4:30 p.m. my daughter is returned home again with a pleasant greeting.

Conversations with my daughter, and on occasion with her classmates, gives me added assurance that these City employees carry out their responsibilities in an exemplary manner. I am very pleased with services provided by them.

Since Ms. Jones has transported my daughter for two years, since she began school, I'd like to particulary extend my appreciation to her. Services provided well and pleasantly should not go unrecognized and rewarded.

Sincerely,

Rita M. Johnson
Bus Route # 117

[redacted]

May 12, 1983

RECEIVED
DCS MAY 17 AM 11:06
ADMIN. UNIT

Mr. William French
Operation Officer
2115 5th Street, NE.
Washington, DC 20002

Dear Mr. French:

This note is to express my appreciation to Mrs. J. Jones, Bus Attendant on Route 117. Mrs. Jones has done in my opinion an outstanding job while working with my son Calvin Hampton. Mrs. Jones seems to take the time to understand and listen to the children when they are having some type or problem or just plain want to talk. In the years that she has worked with my son he has grown very fond of her. Please extend my thanks and appreciation to Mrs. Jones and I look forward to working with her again in the coming school year.

Sincerely,

Lorraine McCrae

Lorraine McCrae

S.R.E. 78

J. Jones

May 23, 1983
444 Riggs Road N.E.
Washington, D. C. 20011

Mr. William French
2115 Fifth Street N.E.
Washington, D. C. 20017

Dear Mr. French

As we prepare for the close of another school year, it is my pleasure to commend two of your employees — Mrs. Juanita Jones and Mr. Richard Casey, Route B117.

This is my son's third year riding the school bus with Mrs. Jones in attendance and during this time we have been generally pleased with the service — they are prompt, neat in appearance (and the bus is clean), they are attentive and friendly toward the children and the families. My son genuinely feels comfortable with them and looks forward to riding the bus each day.

In the case of children with special needs, it is so important that they feel loved and protected by the significant caregivers in their lives; and while they are on that bus for three to four hours each day the driver and attendant are their caregivers.

I have talked with Mrs. Jones and Mr. Casey, and for the previous two years Mr. Bolding, and I get the feeling that these people sincerely enjoy these special children with whom they share their day and this love gets communicated to the children and to me as parent.

Also, Mr. French, you are to be commended for the general upkeep and appearance of your buses. In the past three years my son informed me only once or twice that his bus had broken down while they were onboard. And, around the City I've not noticed too many instances of malfunctioning buses in traffic. (Though I know you do have them) This says something about management and preventive maintenance care.

Administratively, this has been a superb year for us. In the early weeks of this school year I even received two calls from the dispatcher saying the bus would be late arriving. This helped me in planning when to put my son's outerwear on and not have him get overheated and overly-anxious about the bus' arrival. Also, the policy worked out between Transportation and Christ Church Child Center regarding the arrival time of D.C. Students when Prince George's had a delayed opening was so much more sensible this year.

Again, I commend you and your staff on a job well done for 1982-83. We look forward to working with you again next year.

Yours sincerely,

Delores E. Armstead

Mr. and Mrs. Ronald A. Armstead

T. Jones

May 3, 1983

Mr. William French
D.C. Schools
Transportation
2115 5th St. N.E.
Washington, D.C. 20002

Dear Mr. French -

I am writing to tell you that we have been very happy with the services provided by Mr. Casey and Mrs. Jones on route #117 this year. Our daughter, Alexandra, rides on that bus. The bus has consistently arrived on time every day and Mr. Casey and Mrs Jones have been courteous, friendly and helpful.

As you may know, we are very concerned about the excessive amount of time the children must spend on the bus each day and sincerely hope the situation will be better next year.

We would be very happy to learn that Mr. Casey and Mrs. Jones would be on our daughter's route next year. She likes them both and enjoys seeing them each day.

Sincerely,
(Mrs.) Karen Martel (882-9639)

Mr. MARTINEZ. Very good.

Ms. JONES. I take care of the handicapped children on the bus in from home and to the school and back and forth. I am very much a lover of children. I try to do my job the best that I can, and I have several letters from the parents and from the schools, and I have no problem at all other than that test that they said was confirmed as positive.

Mr. MARTINEZ. How did you feel when you were told that you are a marijuana user and you know you're not?

Ms. JONES. How did I feel?

Mr. MARTINEZ. And knowing that you're going to have to tell your family and friends that you've been fired because they have accused you of this.

Ms. JONES. I felt sick, very sick inside.

You know, I just couldn't believe how they would even think about not giving me a second test, knowing that I was the type of employee that I was, I just couldn't figure it out.

But to me, I was just totally sick, sick because I had to tell my family and especially my little grandson, 13 years of age, and my husband. I was sick to my stomach.

Mr. MARTINEZ. That was a very traumatic experience, I would imagine.

Ms. JONES. It was.

Mr. MARTINEZ. I know how most people feel when they are accused wrongly of something. And in this case, it was costing you your job.

Ms. JONES. It did cost me my job. But later on I was reinstated. The court reinstated me with back pay and whatever.

Mr. MARTINEZ. I didn't mean to get into questioning you right away. To me it is a tragedy when people who are basically honest and working hard for a living and trying to do their job well all of a sudden find themselves in this kind of a predicament because somebody else is completely insensitive or doesn't accurately know what the real situation is.

Ms. JONES. Right.

Mr. MARTINEZ. Before anybody should accuse anybody, they ought to very extensively go through every procedure and step they can take to assure that they are not accusing falsely.

Ms. JONES. Right.

Mr. MARTINEZ. Wouldn't you agree with that?

Ms. JONES. Certainly.

Mr. MARTINEZ. Were there others like yourself in the same predicament? Do you know of any others that were in your particular situation in your particular area?

Ms. JONES. There were others. There were others.

Mr. MARTINEZ. Did you have any reasons to believe that this might be more than just accusing you of drugs? That it might be an effort to try to get rid of a certain number of employees or certain kind of employees or anything else?

Ms. JONES. No reason whatsoever.

Mr. MARTINEZ. You think not.

Ms. JONES. I just think it really was a mistake that was made, you know. I don't think they were trying to get rid of me or anything, because I was up for a better position during that time.

Mr. MARTINEZ. But in your mind, you actually felt that they really believed that you were a marijuana user?

Ms. JONES. At the time, I really felt they really believed that. I really do. Yes, because I was getting along with my employees and my supervisor, and we were always getting along, and you know, I just felt that there was a mistake made, and I felt like I have to fight to clear this mistake, you know, to get this label off of me.

Mr. MARTINEZ. Have you felt that this kind of a blemish on your record will impair you in the future if somebody should look at it and not really investigate the final disposition of it? Has it in any other way affected you? Well, it did affect you in your promotion.

Ms. JONES. Sure, it did.

Mr. MARTINEZ. You didn't get your promotion.

Ms. JONES. I didn't get it. I haven't gotten it yet.

Mr. MARTINEZ. Is there anything else you would like to add at this time?

Ms. JONES. Other than that I was happy to get my job back and I was happy to see my children.

Mr. MARTINEZ. What is the attitude there now, Ms. Jones?

Ms. JONES. They're treating me better than ever for some reason or other. They're treating me better than ever. [Laughter.]

Mr. MARTINEZ. I think that's wise of them.

Ms. JONES. Other than they just won't give me my job that I had put in for before I left.

Mr. MARTINEZ. Oh.

Ms. JONES. They haven't given me that. I don't know why. Sometimes they say it's because of the test. I don't know what it is.

Mr. SCHUMER. Mr. Chairman.

Mr. MARTINEZ. Yes, Mr. Schumer?

Mr. SCHUMER. Mr. Chairman, I just thought it was noteworthy, and I would ask consent maybe that you could read into the record the comments, the work performance rating that Ms. Jones received before she was fired: the amount of work, always above par; completion of work on schedule, above standard quality; accuracy, superior; neatness of work product, done in a manner rarely exhibited; thoroughness, has always exceeded job requirements.

In other words, Ms. Jones' before this random test, this test that showed incorrectly that she was using marijuana, had an exemplary work record, but it didn't even matter.

Ms. JONES. No.

Mr. SCHUMER. They just fired her.

Ms. JONES. That's right.

Mr. SCHUMER. I don't want to ask questions, but I thought we should read this, if we could read her performance ratings into the record, it would be helpful.

Mr. MARTINEZ. Is there any objection?

[No response.]

Mr. MARTINEZ. No. We will do that.

I didn't mean to get into questioning period at this time either. We usually hear the whole panel and then take questions, but it just struck me that here is a situation where a person personally has been affected by random testing and a bad decision being made as a result of that.

I understand there were others tested that were let go, too?

Ms. JONES. There were others tested at that particular time, too.

Mr. MARTINEZ. Were they let go?

Ms. JONES. Quite a few.

Mr. MARTINEZ. What did they do?

Ms. JONES. Just did the same thing I did.

Mr. MARTINEZ. Have any of them been rehired?

Ms. JONES. Oh, sure. The majority of them are back at work, those that wanted to come back. I came back because I love my children. That's why I came back. Otherwise, I wouldn't have gone back either. [Laughter.]

Mr. MARTINEZ. I can imagine someone would be so indignant that a company would do something like that that they wouldn't want to come back to work.

Ms. JONES. Right.

Mr. MARTINEZ. Let's get on with the rest of the panel, and then we will come back. Other members of the panel will probably want to ask some questions.

Our next witness is Dr. Joseph Mulé.

But first, Mr. Soley, did you want to say something? Did you have some remarks to make?

Mr. SOLEY. I asked to make a brief statement on the statute of the law. That would be up to you, Mr. Chairman.

Mr. MARTINEZ. All right. Why don't we have that right now, then.

Mr. SOLEY. Thank you, Mr. Chairman, and members of the House Education and Labor Subcommittee on Employment Opportunities. I have been asked to make a brief statement on the status of the law of drug testing in the United States, and I will try to do so very briefly.

Essentially, the law is on two tracks in the United States. There is one set of rules for private employers, and there is another set for public employers. Private employees essentially do not have the protections of the Constitution; in essence, they have what rights they get in their collective bargaining agreement or they get the rights that they have in their contracts with their employer.

In the cases of California and Montana, there are state constitutional protections which the employees has as to invasion of privacy, and California has interpreted their State constitutional invasion-of-privacy provision to apply to drug tests. But otherwise, an employee has nothing unless it is in their collective bargaining agreement.

The Federal system is very different in that Federal employees do have the protections of the Fourth and Fifth Amendments: the Fourth Amendment in that a test has been considered by every circuit court in the country that has ruled on the issue has been ruled to be a search and seizure pursuant to the Fourth Amendment; and there are also Fifth Amendment protections of fairness which employees do receive.

None of these protections apply to private employees, strictly to Government employees.

The case law on drug testing in the Federal sector has been very mixed. Each circuit that has ruled on this issue has come up with a new decision, completely different from all the other circuits. The Fifth Circuit has allowed random drug testing for Customs employees, for example, finding that Customs employees are in the forefront of the war against drugs and that they are susceptible to blackmail and have to carry arms, and there are other factors which are especially involved where the Fifth Circuit found that these people should be tested.

The Supreme Court has granted certiorari in that case, and that will be argued to the Supreme Court soon. So, hopefully, we will have some national law in the area.

In the case of Juanita Jones, the District of Columbia Circuit ruled that drug testing would be allowed on school bus attendants, especially in Ms. Jones' case, but only where three requirements are met:

One, the drug test has to be administered as part of a medical examination; two, the person tested has to be a person whose job involves some type of safety; and the third requirement is there must be a nexus—the drug test must be a test which is related, where there is a nexus to a legitimate aim of the Government.

In the case of Juanita Jones, the court said the drug test must test for present impairment of drugs; in other words, drug use on the job. And to the best of my knowledge, and as the Ninth Circuit in the Burnley case has already stated, there is no urinalysis test to date which does test for present impairment.

The Ninth Circuit, in a California case, has also determined that railroad employers cannot test railroad employees for drugs in the absence of individualized suspicion to believe that railroad employees are using drugs.

The Eighth Circuit has allowed random testing of prison guards if those prison guards have day-to-day contact with prison inmates in medium and maximum security institutions and said that there must be individualized suspicion to suspect that the prison guard uses drugs before testing any other prison guard.

The Third Circuit, in a very different decision than the other circuits, has ruled that racinghorse jockeys can be randomly tested for drugs.

So, there are Federal protections which are in place. The courts, each circuit has a different test, different standards for who should, for how to define these Federal protections. But they are in place in the Federal system today. The Supreme Court will, hopefully, review these protections in a later case.

But these protections definitely do not apply to private employers, which are the subject of your bill today.

Mr. MARTINEZ. Thank you, Mr. Soley.

Mr. Mulé.

STATEMENT OF S. JOSEPH MULÉ, DIRECTOR, NEW YORK STATE DIVISION OF SUBSTANCE ABUSE SERVICES TESTING AND RESEARCH LABORATORY

Mr. MULÉ. Mr. Chairman, members of the committee, in the interest of time, I will emphasize the important aspects of my testimony this morning.

I would like to address and perhaps clarify the issue of accuracy; that is, the reliability of drug testing. The laboratory of which I am director has processed more than five million urine samples over the last 18 years. We have never, to my knowledge, lost a challenge to one of our confirmed tests on the basis of the accuracy of the tests themselves.

Basically, the reliability of urinalysis may be viewed in terms of 13 separate and distinct functions. Based on my own research, my experience particularly in forensic toxicology, these are:

First, the request for the drug analysis: This should be initiated by the drug detection program's physician or designate of this physician or an individual's personal physician.

The second is the urine specimen collection: The integrity of the sample is essential. The sample should be collected under observation, sealed with evidence tape, properly identified, and a chain-of-custody document with authorized signature, time, and date prepared.

The third is the chain of custody: In order to have forensically acceptable results which are legally defensible, the laboratory must have an effective chain-of-custody protocol in place which is well documented and fully implemented. Once a sample is received and signed for at the laboratory, a continuing chain-of-custody procedure should account for it at all times. This assures that the identity and integrity of the sample cannot be compromised.

Laboratory security: Access to the laboratory or the drug testing areas must be secured and limited to authorized personnel. A log must be maintained of all individuals that access that area and unauthorized individuals must be escorted by authorized personnel.

Fifth, sample identification: The laboratory must have an identification procedure which minimizes or eliminates the possibility of mixing samples, transposing of samples, or the misidentification of samples. Computerization and duplicate samples are recommended.

Standard operating procedures, SOP: The laboratory should utilize an SOP for processing the test sample which is scientifically and legally defensible. The SOP should be consistent with test product labeling and/or the published literature. The laboratory should have not only initial screening testing procedures, but also procedures governing confirmatory tests, and both should clearly indicate the level of sensitivity for all drugs tested.

Seven, a laboratory manual: One which clearly defines all the techniques and all the procedures concerning the drug testing process must be available and current at all times.

Eight, product reliability: There may be differences in the reliability of results obtained from different testing products. The laboratory must be cognizant of these differences and their implications must be adjusted for. The major ways in which products differ are

the precision and accuracy, the specificity, and the sensitivity—that is, the limit of detection.

However, as mentioned earlier, both screening and confirmation testing products are available which, when used properly in combination, are essentially conclusive and are completely defensible both scientifically and in court.

Personnel qualifications: The competence of the staff performing the tests obviously impacts on the quality of the results. This is essentially true with methods that require a high degree of technical competence or when products are prone to user variation. Thus, the laboratory and all laboratory staff directly involved in these tests must be certified by either city, State, Federal, or professional societies.

Ten, quality assurance and quality control: Internal quality control programs must consist of both known and blind drug standards. Ideally, this should be supplemented with an external proficiency program conducted by either State, Federal, or professional organizations, which may be conducted in a blind and/or open manner. In addition, there should be day-to-day auditing and verification of all drug testing functions.

Analytical procedures: Currently, the primary screening techniques that are used today are the enzyme immunoassay, the EIA, essentially the emit system; the radioimmune assay, RIA; fluorescence immunoassay, FPIA—that is both fluorescence polar immunoassay; and thin-layer chromatography, TLC.

Methods commonly used for confirmation of presumptively positive results are gas liquid chromatography, GLC; high-performance liquid chromatography, HPLC; gas chromatography coupled with mass spectroscopy, GCMS; and special solid-phase extraction thin-layer chromatography.

Confirmation must be used for all presumptively positive samples obtained through the employee screening process—that is, workplace testing—where a job may be gained or lost based on the test result.

In addition, security, safety, career advancement, or punishment implications require confirmation of all screening test results.

Twelve, specimen retention: Urine samples positive for drugs must be retained in a pure freezer for at least six months, normally, six months to a year, in order to allow retesting of the sample should a legal challenge be made.

The report: The laboratory director or technical supervisor must certify all testing results reported. The report should be secured and the results submitted to a physician and/or his designate or a medical review officer.

In summary, then, drug abuse testing, which has grown dramatically primarily because of the expansion of private and public sector concerns with safety and security, as urinalysis becomes more widespread, the need for careful collection and laboratory controls increase. Each organization involved in the drug abuse testing must develop a policy that is clearly communicated to all concerned and is sensitive to constitutional issues.

The reliability of drug testing involves many factors such as those I have indicated—chain of custody, sample identification, standard procedures, qualified personnel, quality assurance, quality

control, documentation, and reports. The screening methods primarily used today are EIA, RIA, FPIA, and TLC. Confirmation is generally some form of chromatographic technique: HPLC, GLC, GCMS. And there are newer methods becoming available such as GC, IR, MS, and MS in tandem MS.

Confirmation of results is required where a job, career, security, safety, or punishment is affected by the test result.

In conclusion, then, I would like to state that utilizing both screening and confirmation methods—and the confirmation method and technique must be chemically and physically different than the screening technique—for all the drugs tested which takes into consideration the factors that I have discussed constitute the reliability of testing, and essentially one may expect 100 percent accuracy.

I would be happy to respond to any questions.

[The prepared statement of S. Joseph Mulé follows:]

TESTIMONY OF

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BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

April 21, 1988

Mr. Chairman, thank you for the opportunity to testify before the subcommittee this morning. Urinalysis for drugs of abuse is an area currently receiving significant public attention and high visibility. Today, one cannot pick up a newspaper or journal without seeing several articles on the drug testing issue. In addition, there is continuous television coverage on the subject of drug abuse. The use of drugs is now a matter of serious concern to industry, government (federal, state, local), education, military, public transportation, athletics, national security, public safety and the general public at large.

The implications of drug use are tragic at a personal level, and impact on the business community, the economy and the security of the United States. It has been estimated that substance abuse costs American industry alone billions of dollars a year.

The expanded use of urinalysis for drugs of abuse as an effective tool to detect and deter drug use has resulted in controversy and concern in both the public and private sectors. Among the key issues is the question of the RELIABILITY OF DRUG TESTING.

While constitutionally based legal issues and the necessity for a rationally developed and clearly articulated organizational policy are key components of the ongoing public debate over drug testing, it is not my purpose to focus on

these questions. Instead, I would like to address and perhaps clarify a third source of controversy: the reliability of drug testing.

Obviously, profound implications flow from incorrect test results. The implications of false positives (unconfirmed positives) are clear, especially where a job, career, reputation or treatment credibility is at stake. False negatives occur and are mostly due to the sensitivity or "cut off" level of the method employed. Such a failure to identify drug abuse may be serious in relation to safety or security issues. Thus it is crucial to understand the degree of accuracy obtainable through urinalysis and the factors which affect that accuracy.

Modern urinalysis drug screening and confirmation tests are extremely sensitive and sophisticated. They are subjected to extensive trials and government approval before being brought to market, and thus have been proven in practice. Appropriate commonly used screening tests, coupled with confirmatory tests, where called for, yield essentially a 100 percent confidence level from a purely technical standpoint. In my mind, accuracy of such a testing system itself is no longer an issue.

The laboratory of which I am Director has processed more than five million samples over the last 18 years, and we have never lost a challenge to one of our confirmed tests on the basis of the accuracy of the tests themselves.

This is not to say that uncertainty never arises in the broader process of sample collection and testing. This process

is a complex one, and there are a number of considerations we must look at to make sure that errors are not introduced at the various stages of progress and to give us confidence that a given result accurately reflects the true analyte (drug) level of a specific person at a specific time.

Basically, the reliability of urinalysis may be viewed in terms of thirteen separate and distinct functions. Based on my research and my experience, particularly in forensic toxicology, these are:

1. REQUEST FOR THE DRUG ANALYSIS

Initiated by the drug detection program physician, a designate or an individual's personal physician.

2. URINE SPECIMEN COLLECTION

The integrity of the sample is essential. The sample should be collected under observation, sealed with evidence tape, properly identified and a chain of custody document with authorized signature, time and date prepared.

3. CHAIN OF CUSTODY

In order to have forensically acceptable results which are legally defensible, a laboratory must have an effective chain of custody protocol in place, which is well documented and fully implemented. Once a sample is received and signed for at the laboratory, a continuing chain of custody procedure should

account for it at all times. This assures that the identity and integrity of the sample cannot be compromised.

4. LABORATORY SECURITY

Access to the laboratory or the drug testing area must be secured and limited to authorized personnel. A log must be maintained of all individuals that access the area, and unauthorized individuals must be escorted by authorized personnel.

5. SAMPLE IDENTIFICATION

The laboratory must have an identification procedure which minimizes or eliminates the possibility of mixing samples, transposing of samples or the misidentification of samples. Computer accession and duplicate samples are recommended.

6. STANDARD OPERATING PROCEDURES (SOP)

The laboratory should utilize a SOP for processing the test samples which is scientifically and legally defensible. The SOP should be consistent with test product labeling and/or the published literature. The laboratory should have not only initial screening testing procedures, but also procedures governing confirmatory tests, and both should clearly indicate the level of sensitivity for all drugs tested.

7. **LABORATORY MANUAL**

A manual which clearly defines all techniques and procedures concerning the drug testing process must be available and current.

8. **PRODUCT RELIABILITY**

There may be differences in the reliability of results obtained from different testing products. The laboratory must be cognizant of these differences and their implications and must adjust for them. The major ways in which products differ are:

a) Precision and accuracy;

b) Specificity, and

c) Sensitivity (LOD).

However, as mentioned earlier, both screening and confirmation testing products are available which, when used properly in combination, are conclusive and are completely defensible, both scientifically and in court.

9. **PERSONNEL QUALIFICATIONS**

The competence of the staff performing the tests obviously impacts on the quality of the results. This is especially true with methods that require a high degree of technical competence or when products are prone to user variation. Thus, the laboratory and all laboratory staff directly involved in these tests must be certified by either city, state, federal or professional societies.

10. **QUALITY ASSURANCE/QUALITY CONTROL**

Internal quality control programs must consist of both known and blind drug standards. Ideally, this should be supplemented with an external proficiency program conducted by either state, federal or professional organizations which may be conducted in a blind and/or open manner. In addition, there should be day-to-day auditing and verification of all drug testing functions.

11. **ANALYTICAL PROCEDURES**

Currently, the primary screening techniques used are: enzyme immunoassay (EIA); radioimmunoassay (RIA) fluorescence immunoassay (FPIA) and thin-layer chromatography (TLC). Methods commonly used for confirmation of presumptively positive results are: gas-liquid chromatography (GLC); high performance liquid chromatography (HPLC); gas-chromatography coupled with mass spectroscopy (GC/MS), and special solid phase extraction thin layer chromatography methods. Confirmation must be used for all presumptively positive samples obtained through the employee screening process (workplace testing) where a job may be gained or lost based upon the test results. In addition, security, safety, career advancement or punishment implications require confirmation of all screening test results.

12. **SPECIMEN RETENTION**

Urine samples positive for drugs must be retained in a secure

freezer for at least 6 months in order to allow retesting of the sample should a legal challenge be made.

13. **REPORT**

The laboratory director or technical supervisor must certify all testing results reported. The report should be secured and results submitted to a physician or his designate and/or medical review officer.

SUMMARY

Drug abuse testing has grown dramatically, primarily because of the expansion of private and public sector concerns with safety and security. As urinalysis testing becomes more widespread, the need for careful collection and laboratory controls increases. Each organization involved in drug abuse testing must develop a policy that is clearly communicated to all concerned and is sensitive to constitutional rights. The reliability of drug testing involves many factors such as: chain of custody, sample identification, standard procedures, product reliability, qualified personnel, quality assurance, quality control, documentation and reports. Currently, the screening methods for urinalysis involve EIA, RIA, FPIA, TLC and confirmation involves various (gas liquid, high performance liquid) chromatographic techniques alone or coupled with mass-spectroscopy. Confirmation of results is required where a job, career, security, safety or punishment is affected by the test result.

CONCLUSION

Utilizing both screening and confirmation methods for all the drugs tested as well as the factors I have discussed that constitute reliability of testing, one may expect essentially 100 percent accuracy.

I would be happy to respond to any questions the subcommittee may have.

Mr. MARTINEZ. Thank you, Mr. Mulé.

Let me interrupt and ask the panel, do you think it might be a good idea before we go into Mr. McBay's testimony, rather than interrupt his testimony, to leave and make the vote on the roll and then come back?

We will take another short recess.

[Recess.]

Mr. MARTINEZ. How is this for cooperation? We all got back together. [Laughter.]

Okay. We will resume.

We had finished off with Mr. Mulé's testimony, and we will now go to Mr. McBay.

STATEMENT OF ARTHUR McBAY, CHIEF TOXICOLOGIST, OFFICE OF THE CHIEF MEDICAL EXAMINER, STATE OF NORTH CAROLINA

Mr. MCBAY. Mr. Chairman, and members of the committee, I am going to try to address the topic of cost-effective forensic quality drug testing.

Quality random drug testing and needs the controls of H.R. 691, the Employees Drug Testing Protection Act, and also those of the HHS guidelines. Urine and blood can be tested accurately and properly for drugs or abuse. The results can be of value when interpreted properly. Blood testing, which is much more expensive and is available in fewer laboratories, is more temporal and can reveal more information than urine testing can.

The findings of a drug in urine means that the person has ingested the drug at some time, if no mistake is made in the testing procedure from the time the urine is voided until the results are interpreted.

The impossibility of correlating blood or urine drug concentrations with driving impairment has been reported in a consensus report.

The 1984 survey has been repeatedly cited as evidence of the economic cost to society of drug abuse and of the need for testing workers. The economic cost to society in 1983 was estimated to be about $116 billion for alcohol abuse and $60 billion for other drug abuse.

The costs cited for drug abuse are greatly exaggerated, and my reference there is to some of my reasons, and it's given in the paper. I estimate the cost of other drug abuse at less than 10 percent that of alcohol abuse.

Limited testing, especially marijuana use, that was performed for the military service from 1983 to 1985 was reported to have cost about $175 million a year. During the three-year period, 51,000 Service personnel were discharged at an average cost of about $22,000 to replace each person discharged.

Using these estimates, the total program cost about $1.5 billion for the three years. I have been unable to get any other figures, but I have tried. It costs about $200 to test a urine specimen of an NCAA athlete. I have been unable to find any other estimates of the cost to the Government or private sector testing programs. I have seen no evidence that any of the urine testing programs have

had a beneficial effect on the health, safety, or productivity of the Armed Services or any other group tested.

Transportation accidents' fatalities have been blamed on drugs, but in most cases the only drug found has been alcohol. The probable cause of the recent crash of an Amtrak passenger train into the rear of a train of three Conrail locomotives was reported to be due to the failure as a result of impairment from marijuana of the Conrail engineer to stop his train. His train was stopped. The engineer tried to stop when he saw a red signal, and eventually he succeeded. The other train ran into him.

The drug testing was flawed. The specimen was retained about 5, 8, and 90 hours late. Since neither THC or alcohol was found in the blood of the engineer, the finding of impaired at the time of the accident from the effects of marijuana possibly with the combined effects of alcohol the night before the accident is not scientifically supportable. The fact that none was found meant that probably he might have used it the night before based upon other information given.

This train crash and many others should not have occurred if the signals were operating properly and the Conrail locomotives had been equipped with the automatic train control systems that have been available since 1978 and was recommended for all trains using the heavily scheduled and high-speed northeast corridor.

Two commercial airplane pilots who were impaired by alcohol were discharged, one, who was assisted into the cockpit by two crew members tested "positive for alcohol" at the end of the flight. The other had a 0.13 percent alcohol in his blood at the end of the flight. Both were allowed to be reinstated after rehabilitation. Breath testing for alcohol could have prevented these pilots from flying impaired.

Random testing does not reveal those who might occasionally use a drug, nor does it prevent a person from using a drug after being tested. Daily testing would be needed to accomplish this. Testing immediately before starting a safety-related test might ensure that the person had not used drugs for which properly conducted analyses were made. But this is expensive and logistically impossible except for the one drug that has been related to most crashes and performance impairment: alcohol.

Alcohol testing can be noninvasive, inexpensive, and accurate. Breath can be tested with minimal training. Results are immediately available and interpretable, and inexpensive instruments can provide tests for less than a dollar each.

Certification of drug testing laboratories about to start should improve the programs, but it will not guarantee that the results of inadequate tests won't be reported and interpreted improperly. Unless urine specimens are obtained from subjects taking drugs are used in proficiency testing programs or performance testing programs, the ability of laboratories to correctly analyze actual specimens will not be tested. Laboratories are reporting the identification and quantitation of drugs at concentrations lower than those for which they have demonstrated capability of identifying and quantitating.

The private employer is not required to obtain a confirmatory test or to use a certified laboratory. At the present time, I know of

no laboratory doing workplace drug testing that I could confidently recommend for urine or blood testing for a wide variety of drugs that are available to the employed and the unemployed, not just the four or five that are mentioned in the bill. I am talking about drugs that could affect their performance certainly: antihistamines and a whole host of drugs that aren't even looked for.

Most of the workers whose urines are tested have no signs, symptoms, or other evidence of drug use or impairment. Decisions are based on the results of one specimen obtained, controlled, tested, and preserved for the employer.

Testing programs should require that the original specimen be split into duplicate specimens, one specimen being sent to the laboratory by the employer; the other specimen should be labeled, sealed, and preserved by freezing, if necessary. When the first specimen tests positive and the worker challenges the result, the second specimen could be divided equally into two containers, one being given to the employer, the other to the employee or his representative. Both the employer and employee could have the specimen tested independently by qualified analysts.

This procedure could solve many of the problems that arise from testing a single specimen such as chain of custody, mislabeling, specimen switching, contamination, carryover, instrumental, technician, and reporting errors.

If it could be proven that drugs other than alcohol responsible for adversely affecting health, safety, and performance of a significant number of workers and that drug testing could prevent or solve such a problem, then the use of testing programs should be weighed against the infringement upon the personal rights of the worker.

I know of no plan to test those most likely to be using drugs: the unemployed. In my opinion, that random drug testing is a waste of time and money, is counterproductive, and can create a false sense of security.

I would like also to address a couple of comments on the mandatory guidelines for the Federal testing, workplace drug testing programs. The Federal Register just came out April 11. I didn't get it until last Thursday. So, I would like to add this to it.

The guideline offers questionable excuses for not requiring a split specimen. It is a cumbersome and expensive process and requires "retention of one specimen for an indefinite period of time in some type of secured, long-term refrigerated storage."

Well, negative and unchallenged positives could be discarded immediately. Challenged positives should be retested immediately by both parties. I don't think this is cumbersome or requires expensive special storage. This system has been used for Olympic and other athletes for some time.

The "guidelines specifically reject allowing the employee or anyone else from presenting to the medical review officer a split sample or private sample that does not fully comply with these guidelines." In other words, the employee cannot even offer any evidence in any sense if he's innocent—or guilty, for that matter.

The guidelines specifically specify confirmation using gas chromatography, mass spectrometry techniques, GCMS, but does not specify which techniques. The Armed Services and most commer-

cial laboratories use the more expedient, more profitable, less certain identification by GCMS techniques which monitor one or more mass ions rather than the forensic identification available using full mass spectrum.

There would be no need for a large number of performance and quality control specimens if a full spectrum GC mass spec technique was used.

The ion monitoring methods may be good enough to test the urines of members of the Armed Service, preemployees, and employees and others in the private sector who, in my opinion, have very limited rights. This is not the best way to identify drugs. Government and other employees are supposed to have more rights than the above employees.

I believe that drug problems are serious enough so that drug testing should be viewed very seriously.

The guidelines appear to justify greater protection to charged criminals. "The legal interest at issue in the criminal justice system, including liberty, private property interests, are different and, therefore, are subject to established practices, constitutional protections, and evidentiary rules specific to the criminal justice system."

Does this mean that criminals and potential criminals have more rights and deserve greater protection than noncriminals?

One last comment. I testified in the WMATA cases in Washington, at least three of them, and not only was the EMIT the only test used, it was the only test used because that's all that WMATA would pay for. Second, the tests weren't even used properly. They were not done according to the manufacturer's directions. They would not have stood up. And of course, the confirmation by the same test only means that you are finding the same substances interfering or causing the test.

Thank you.

[The prepared statement of Arthur J. McBay follows:]

STATEMENT BY

Arthur J. McBay, Ph.D.

Chief Toxicologist
Office of the Chief Medical Examiner
and
Professor of Pathology and Pharmacy
University of North Carolina
Chapel Hill

BEFORE

Committee on Education and Labor
Subcommittee on Employment Opportunities
April 21, 1988
9:30 a.m.

Cost-Effective, Forensic Quality Drug Testing

The quality of random drug testing is variable and needs the controls of H.R. 691, The Employees Drug Testing Protection Act.

Urine and blood can be tested properly and accurately for drugs of abuse. The results can be of value when interpreted properly. Blood testing which is more expensive and is available in fewer laboratories is more temporal and can reveal more information than urine testing. The finding of a drug in urine means that the person has ingested the drug at some time if no mistake is made in the testing procedure from the time the urine is voided until the results are interpreted. The impossibility of correlating blood or urine drug concentrations with driving impairment has been reported in a consensus panel report (1).

A 1984 survey has been repeatedly cited as evidence of the economic cost to society of drug abuse and of the need for testing workers (2). The economic cost to society in 1983 was estimated to be about $116 billion for alcohol abuse and $60 billion for other drug abuse. The costs cited for drug abuse are greatly overexaggerated (3). I estimate the cost of other drug abuse at less than 10% that of alcohol abuse.

Limited testing, principally for marijuana use, that was performed by the military services from 1983 to 1985 was reported to have cost about $175 million per year (4). During the three year period 51,000 service personnel were discharged at an average cost of about $22,000 to replace each person discharged (5). Using these estimates the total program costs about $1.5 billion for the three years. It costs about $200 to test a urine specimen of an NCAA athlete (6). I have been unable to find any other estimates of the costs of other government or of private sector testing programs. I have been unable to find any evidence that any of the urine testing programs have had a beneficial effect on the health, safety, or productivity of the armed services or any other group tested.

Transportation accidents and fatalities have been blamed on drugs but in most cases the only drug found has been alcohol. The probable cause of the recent crash of an Amtrak passenger train into the rear of a train of,three Conrail locomotives was reported to be due to the failure, as a result of impairment from marijuana, of the Conrail engineer to stop his train (7). The engineer tried to stop when he saw the red signal. The drug testing was flawed. Specimens were obtained about 5, 8, and 90 hours late. Since neither THC or alcohol was found in the blood of the engineer, the finding of "impaired at the time of the accident from the effects of marijuana possibly combined with the effects of alcohol the night before the accident", is not scientifically supportable (1). This train crash and many others should not have occurred if the signals were operating properly and the Conrail locomotives had been equipped with the automatic train control (ATC) system that had been available since 1978 and was recommended for all trains using the heavily scheduled and high speed Northeast Corridor.

Two commercial airline pilots who were impaired by alcohol were discharged. One who was assisted into the cockpit by two crew members, "tested positive for alcohol" at the end of the flight (8a). The other had 0.13% alcohol in his blood at the end of the flight (8b). Both were allowed to be reinstated after rehabilitation. Breath testing for alcohol could have prevented these pilots from flying impaired.

Random testing does not reveal those who might occasionally use a drug nor does it prevent a person from using a drug after being tested. Daily testing would be needed to accomplish this. Testing immediately before starting a safety related task might insure that the person has not used the drugs for

which properly conducted analyses were made but this is expensive and logistically impossible except for the one drug that has been related to most crashes and performance impairment, alcohol. Alcohol testing can be noninvasive, inexpensive, and accurate. Breath can be tested with minimal training, results are immediately available and interpretable, and inexpensive instruments can provide tests at less than $1 each.

Certification of drug testing laboratories which is about to start, should improve the programs but it will not guarantee that the results of inadequate tests won't be reported and interpreted improperly. Unless urine specimens are obtained from subjects taking drugs are used in proficiency testing programs, the ability of laboratories to correctly analyze actual specimens will not be tested. Laboratories are reporting the identification and quantitation of drugs at concentrations lower than those for which they have demonstrated capability of identifying and quantitating. A private employer is not required to obtain a confirmatory test or to use a certified laboratory. At the present time I know of no laboratory doing workplace drug testing that I could unconditionally recommend for urine or blood testing for the wide variety of drugs that are available to the employed and unemployed.

Most of the workers whose urines are tested have no signs, symptoms or other evidence of drug use or impairment. Decisions are based on the results of tests on one specimen obtained, controlled, tested, and preserved for the employer. Testing programs should require that the original specimen be split into duplicate specimens. One specimen could be sent to the laboratory by the employer. The other specimen should be labelled, sealed and preserved by freezing, if necessary. When the first specimen tests positive and the worker challenges the results, the second specimen could be divided equally into two containers, one being given to the employer, the other to the employee or his representative. Both the employer and employee could have aliquots of the specimen tested independently by qualified analysts. This procedure could solve many of the problems that arise from testing a single specimen, such as: chain of custody, mislabelling, specimen switching, contamination, carryover, instrumental, technician and reporting errors.

If it could be proven that drugs other than alcohol were responsible for adversely affecting health, safety, and performance of a significant number of workers, and that drug testing could prevent or solve such a problem, then the use of testing programs should be weighed against the infringement upon the personal rights of the worker. I know of no plans to test those most likely to be using drugs, the unemployed.

It is my opinion that random drug testing is a waste of time and money, is counterproductive, and can create a false sense of security.

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The opinions expressed are those of the author:
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I would like to make some comments concerning the "Mandatory Guidelines for Federal Workplace Drug Testing Programs"which appeared in the Federal Register on April 11, 1988, and will govern testing authorized in this bill.

The Guidelines offer questionable excuses for not requiring a split specimen:

It is a "cumbersome and expensive process" and requires "retention of one (specimen) for an indefinite period of time in some type of secured long term refrigerated storage." Negative and unchallenged positives could be discarded immediately. Challenged positives should be retested immediately by both parties. Is this cumbersome and expensive or require special storage? This system has been used for Olympic and other athletes for some time. The "Guidelines specifically reject allowing the employee or anyone else from presenting to the Medical Review Officer a split sample or private sample that does not fully comply with these Guidelines." How does an innocent employee defend himself?

The Guidelines specify confirmation "using gas chromatography/mass spectrometry (GC/MS) techniques" but does not specify which techniques. The armed services and most commercial laboratories use the more expedient, more profitable, less certain identification by GC/MS techniques which monitor one or more mass ions rather than the forensic identification available using full mass spectra. There would be no need for the large number of performance and quality control specimens if a full spectrum GC/MS technique was used. The ion monitoring methods may be good enough to test the urines of members of the armed services, pre-employees and employees, and others in the private sector who in my opinion have limited rights. This is not the best way to identify drugs. Government and other employees are supposed to have more rights than the above employees. I believe that drug problems are serious enough so that drug testing should be viewed very seriously.

The Guidelines appear to justify greater protection to charged criminals. "The legal interests at issue in the criminal justice system including liberty, privacy, and property interests are different and, therefore are subject to established practices, constitutional protections and evidentiary rules specific to the criminal justice system: Does this mean that criminals and potential criminals have more rights and deserve greater protection than non-criminals?

Arthur J. McBay, Ph.D.
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April 20, 1988.
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Mr. MARTINEZ. Thank you, Dr. McBay.

Both your and Dr. Mulé's testimony conjure up a couple of thoughts in my mind, the first being that by Dr. Mulé's testimony that there is reliability in the test but only under laboratory conditions. I am wondering if in every case tests are given in the most ideal of conditions.

Would you be able to testify to the fact that all these tests that are done randomly on these employees are done in the best of laboratory conditions?

Mr. MULÉ. I think that is probably the purpose of the national certification program that Dr. McBay mentioned; that is, to bring a large measure of control to a system that may not be fully controlled.

I can only speak for the State of New York and for my own particular laboratory, which has been under regulation since 1970. The State of New York has always had regulations for the drug testing process. The earlier regulations were for qualitative drug analysis or quantitative. The new regulations, which came in July 1, 1987, are forensic toxicology. They are very strict and they are very tough, and it is controlled by the New York State Health Department. So that we in fact have to comply with in order to be licensed by.

This is not necessarily the case, as you heard, throughout the United States. However, the national laboratory certification program has been designed to try to bring a great and large measure of control to the reliability of the whole process.

Mr. MARTINEZ. Am I right to assume that you have complete confidence in the testing that is done in the laboratory under laboratory conditions and under regulations?

Mr. MULÉ. Well, it adds, of course, a large measure of confidence to all concerned. That is not to say that at some point an error cannot be made. We are human beings.

Mr. MARTINEZ. Right.

Mr. MULÉ. So, there is always the possibility regardless of the measure of controls associated with the process.

Mr. MARTINEZ. Well, then let me ask a follow-up question to that. Would you, by the same token, have less confidence in those tests that are done outside perfect laboratory conditions?

Mr. MULÉ. Yes. That's true.

Mr. MARTINEZ. Well, it then leads me to the assumption that one of the conditions that are really important to having a reliable and accurate test—and more than that to the individual's rights is that there be regulations and conditions existing which mandate that not a single test be done outside the most ideal of conditions and this be the only condition by which a person would be denied his employability or rejected from a job.

Mr. MULÉ. I think it's critical, and this is mandated in the State of New York, with regards to workplace drug testing, we have to confirm that particular test and we have to confirm that test by a method which is both chemically and physically different than the initial screening test. And many of the facets that represent the process of reliability that I mentioned earlier have to be in place and we have to comply with the State regulations.

So, it is essentially there. The Federal guidelines are quite a bit similar along those lines as well, if not tougher essentially.

Mr. MARTINEZ. The situation is, though, that without a national law that requires all States to regulate—as we have heard, only 21 States have any kind of regulation at all—there is going to be more random testing in less than the most reliable conditions or situations.

Mr. MULÉ. Well, there, Mr. Chairman, you run into the legal issues. You get into the random testing. You're getting into the constitutional issues, which is one part of the controversy of the whole drug process. There is three: the organizational policy, the legal issues, and the reliability of the drug testing itself.

But with regards to the national certification program, that is set up and is to apply to those laboratories that wish to conduct urine testing upon Federal employees.

Mr. MARTINEZ. Right.

Mr. MULÉ. Now, what I think will happen, in essence, is that the non-Federal employer, the private sector, will eventually utilize those laboratories, since those laboratories have been certified by the national program. So, that in all probability one of the requirements that a private sector organization will have when it seeks laboratory services is to determine that that laboratory has been certified by the national program.

Mr. MARTINEZ. Very good.

Let me give you a thought that I had as you were all testifying. It seems that as we listen to this testimony, one of the most important aspects of protecting an individual is confirmation. The chances of the first test being inaccurate or inconclusive seems to be great, by reports that we have had and information that we have received. So that it becomes more and more apparent, at least to me and only if to me, that confirmation is one of the important aspects. As you have stated, there are two aspects to this, to the drug testing:

One is the reliability, accuracy and accurate interpretation of the results of the test and the proper determination of what should be done with that information: should it be instant dismissal, or should it be rehabilitation in the case of an employee, or instant rejection of employment of an applicant.

The other side of the coin is the rights of the individual. Especially the individual, for example in Juanita's case, who had a good record and actually was subject to severe damage to her reputation and everything else simply because of random testing, inaccurate random testing.

You know, the one thing is that a false accusation as in the case of Juanita can do irreparable harm to that individual's reputation and thereby really is invading that person's right to privacy.

So, I think that you're right, there is a constitutional and moral issue here as well as a clinical kind of situation. So, I am really concerned, as Congressman Schumer is, that what we do is to guarantee and ensure the rights of the individual as well as protect in those situations that there is needed protection for the employer. But more importantly, the employer must understand that in many cases his best redress is not instant dismissal or rejection of those individuals but maybe rehabilitation.

So, I am looking forward to something like that taking place as we proceed through this process.

There is one question that I have of both you people who are actually in the area of testing, and that is if you agree that there should be confirmation after initial testing.

Mr. McBAY. Oh, absolutely.

Mr. MULÉ. No question.

Mr. McBAY. There is question of that.

Mr. MULÉ. There's no question about that.

Mr. McBAY. Of course, the problem is that because it's a GC—I have testified in cases where the GC mass spec, I could show their data would not identify it. In fact, even against the Air Force, there was no question, and the case was overturned on that basis. In other words, there are bad GC mass spec tests.

Mr. MULÉ. I think Dr. McBay raises an issue which needs addressing. You know, the GC mass spec is not just a magic instrument that magically identifies a drug molecule. There are chemical procedures which must proceed the analysis. Dr. McBay doesn't like select ion monitoring. I know and I feel there is absolutely nothing wrong with that. You wouldn't use one ion. We use a minimum of three to four ions.

But you not only have the select ions which you monitor for, you also look at ion variance ratios and they have to be within a certain range. We use plus or minus 20 percent. A laboratory can use plus or minus 30 percent.

In addition to that, you have the retention time of the total ion current of that molecule, which is also part of the identification process. And that has to be within a certain percent deviation from the standard reference control.

Then finally, you will get a computer readout from the computer portion of the GC mass spec, which also tells you, in effect, what the computer sees: 98 percent, 99 percent, 99.99 percent, and so on.

But utilizing these factors, knowing how to handle the chemistry which is associated with the drug analysis, GC mass spec is a magnificent instrument for the identification of drugs and in this particular case the molecules of these drugs or the ion fragments.

Now, Dr. McBay likes mass fragmentation pattern instead of select ion monitoring. There's nothing wrong with that, and you can certainly utilize that. The differential factor is that if you use the mass fragmentation pattern, you don't have the sensitivity in a very low level. That is, it's oftentimes 15- to 20-fold higher with regards to the capability of giving you high-level sensitivity for that particular test. And that is one of the reasons why individuals have gone—and we have in particular as well as other laboratories—to select ion monitoring.

Mr. MARTINEZ. Dr. Mulé, let me ask you, you have great confidence in the regulations that are in place in New York.

Mr. MULÉ. Yes. I have confidence.

Mr. MARTINEZ. Would you recommend these for the rest of the country?

Mr. MULÉ. Well, essentially, our regulations are quite similar to the national certification regs. I see nothing wrong with the national. I have a tendency to agree with Dr. McBay about the duplicate

sample process. We use the duplicate sample process in our laboratory.

That is, we take two samples at the time of analysis. One sample goes into storage, and the other sample is then put into the analysis process. If the first sample is detected positive through the screening process, we will find the duplicate sample and retest that. If that is positive, we will then move on to the confirmation process.

In addition, Dr. McBay feels—and to some degree I think he's right—he wants the organization of the company to take a sample and retain it. That is, at the time of collection, keep a sample, identify it as part of the split sample process; if it comes up positive and the individual wishes to challenge that particular test, that sample will be available to the individual to have it tested privately by any laboratory of his or her choosing. There is basically nothing wrong with that.

As you get involved in increasing the complexity of the process, you also get involved in increasing the possibility of error and decreasing in some respects. But in fact you increase the cost of the process, too.

But technically, it's a beautiful way to go. I agree totally with Dr. McBay in that regard.

Mr. MARTINEZ. Thank you.

Mr. McBay, you indicate that most of the abuse is by alcohol. Do the companies test as rigidly for alcohol abuse as they do for drug abuse?

Mr. McBAY. Well, that's the strange thing. The Armed Services do, and obviously there is no question about the Armed Services, there are probably no more alcohol problems in the Armed Services than there is in the civilian sector.

Looking at some of our studies—and of course, we're looking at people that die in crashes and everything else—it's better than 50 percent have alcohol. Therefore, you could find out that problem.

But we made a special study of 600 drivers killed in single-vehicle crashes and did marijuana determinations and other drug determinations, and 79 percent had alcohol, 14 percent had drugs, and 79 percent of this 14 percent had alcohol also.

In other words, you could get 8 out of 10 people that were using drugs just by testing for alcohol, plus the fact that you'll get a whole host of others that are just using alcohol, in other words. And it's much less expensive.

The problem is that people want to use statistics, and they'll say "the drug problem," and they're talking about alcohol and drugs. And that's wrong. They've got to separate them in some way, whether it's transportation accidents or whatever. They're talking about all the transportation accidents with drugs, and then you find out when you go through them that 9 out of 10, when you actually see the cases, had alcohol and maybe one or two had some drug.

So, it's unfair to link them together because there is no question about alcohol as a problem.

Mr. MARTINEZ. Should companies apply alcohol abuse rules to the testing procedures, too?

Mr. McBAY. Well, they have different standards. You can rehabilitate a man who abuses alcohol, and yet they'll toss somebody off the job for marijuana, and you really can't rehabilitate a marijuana person and tell them to stop smoking. They don't know what to do with a person who smokes marijuana other than tell them to stop smoking.

You know, it's like rehabilitating a fellow who smokes cigarettes as far as his job is concerned. His job isn't suffering because he's smoking cigarettes. But he—I hate to say it; I'm from North Carolina—he might develop lung cancer, some people say. I don't believe it, obviously. [Laughter.]

But, you know, how do you rehabilitate a fellow? You know, what's there to rehabilitate? In other words, you've got to stop him from smoking. He's probably not suffering on the job. In fact, if he stops smoking, probably his productivity will go down temporarily.

You know, alcohol and other drugs, where the person becomes tolerant and where they become alcohol problems, they do a great deal of damage, those people do require some kind of intervention and rehabilitation.

In North Carolina, for the State employees, we have recommended that we have an employee assistance program. If an employee has a problem, he goes through the employee assistance program. Let the people there decide whether he should be tested for drugs, for alcohol, whether it's a divorce from his wife or property problems or whatever it is. Very few people have a single problem.

Mr. MARTINEZ. It sounds as if you would agree that employees have rights in circumstances involving drugs and drug testing. What would you say would be the bare minimum rights that you would recommend that a company employ?

Mr. McBAY. What would be the what?

Mr. MARTINEZ. The bare minimum requirements regarding the rights of the individuals when they decide to do drug testing in the company.

Mr. McBAY. Well, the reason that people say they're doing drug testing is because they recognize a big problem. They know they've got people with lost productivity and everything. If they know who they are, why do you have to test everybody in the plant? You know, everybody says there's a problem that's out there. They know there's a tremendous problem, they recognize there's a tremendous problem. They have a lot of people. But yet, you begin to ask them, do they know anybody, have they got anybody in particular in mind?

Mr. MARTINEZ. What you're saying is that at minimum it should be suspicion-based testing?

Mr. McBAY. I would say so. Some suspicion, yes. Obviously, if I have an employee of mine and there's something wrong with that employee, it's my duty to find out because obviously they're exposed to chemicals, AIDS, and everything else in my laboratory and it's my duty, if I can do something about it.

But my testing them for drugs would be probably pretty far down the list of priorities. I would like to have them go to employee assistance and find out what is that problem.

Mr. MARTINEZ. Thank you.

Mr. Schumer—oh, Mr. Hayes, excuse me.

Mr. HAYES. Yes, Mr. Chairman.

I want to ask a couple of questions of the victim, Ms. Jones.

I looked at your impeccable record of your performance on the job and the rating that you were given. And the question that just keeps bothering me is why did they pick you in the first place to test? Did they tell you, or what?

Ms. JONES. They didn't just pick me. Everybody at the particular time was. They told us we had to have a physical exam. They never told us it was going to be a drug test. They only said a physical examination.

Mr. HAYES. They never told you it was going to be a drug test?

Ms. JONES. They told us it would be a physical examination. And we went to have the physical. It was just everybody, they didn't just pick me. Everybody had to go.

Mr. HAYES. All right.

Mr. MARTINEZ. Would the gentleman yield?

Mr. HAYES. Yes, Mr. Chairman.

Mr. MARTINEZ. So, what you're saying is that, in effect, the company developed a policy probably because of the accidents that have happened in transportation, to make sure that their employees were drug-free, so they avoided any possible lawsuit against themselves by having an employee that would cause an accident. So, it was just a business decision on their part to test everybody?

Ms. JONES. They were testing everybody for a physical examination.

Mr. MARTINEZ. All right.

Thank you.

Mr. HAYES. The board of education announced this policy, right, that they were going to test all of their employees?

Ms. JONES. Physical exam, every year it comes up once a year.

Mr. HAYES. Did that include members of the board of education? [Laughter.]

Ms. JONES. No. They examined all the employees once a year. We have a physical examination once a year. It may be the transportation department, around May or June of each year we have one.

Mr. HAYES. Was this test administered in a drug testing laboratory?

Ms. JONES. We had this test at the school in Bennington Heights. They sent it to a laboratory.

Mr. HAYES. It wasn't done in the laboratory, though, was it?

Ms. JONES. No, it wasn't.

Mr. HAYES. All right. What did you do, go to some doctor's office or something?

Ms. JONES. No. We went to a school, one of our schools, and had this urine test.

Mr. HAYES. All right.

Mr. MARTINEZ. No, they went to a clinic.

Mr. HAYES. Are you differing with that?

Ms. JONES. Yes, it was Bennington Heights clinic.

Mr. HAYES. Is that right or wrong what she's saying?

Mr. SOLEY. Congressman, just to clarify, Ms. Jones was tested at the Bennington Heights neighborhood clinic, which happens to be part of a school.

Ms. JONES. Yes.

Mr. HAYES. Oh, I see.

Mr. SOLEY. Or adjacent to.

Mr. HAYES. All right.

All right. You confirmed what has been my position all along. This is a random testing process. What happened to you? You are one of the few that has really clearly expressed the story. I am bitterly opposed to just randonly testing people.

I don't want to get into the racial composition. I know without saying——

Ms. JONES. Right.

Mr. HAYES [continuing]. That all the employees tested were black.

Mr. MARTINEZ. Thank you, Mr. Hayes.

Mr. Schumer.

Mr. SCHUMER. Thank you.

First, let me say to Ms. Jones publicly what I have said to her privately, that I think all of us respect your courage in coming here. There is no doubt that there are tens of thousands, hundreds of thousands of people like you, and you have had the courage to come forward, and hopefully, we will importune this Congress to do something to protect you and others from this happening again.

I just would like to ask a few more questions.

When you had had this job for a long time, you have excellent records, positive recommendations, how did you feel when they told you that you were losing your job?

Ms. JONES. Sick. Sick, really.

Mr. SCHUMER. Did they tell you why?

Ms. JONES. Sure.

Mr. SCHUMER. And when you said to them you'd never smoked marijuana in your life, what did they say?

Ms. JONES. He said that the test had confirmed. Then he went on to tell me, you know, the percentage of whatever.

Mr. SCHUMER. Did they ever give you a second test or anything like that?

Ms. JONES. No. I asked for one. I had written for one. I asked for a hearing. They didn't allow me to have one.

Mr. SCHUMER. You asked for a second test.

Ms. JONES. I asked for a test. I asked for a hearing.

Mr. SCHUMER. You asked for a hearing, and they said no.

Ms. JONES. "No."

Mr. SCHUMER. Okay.

Ms. JONES. They told me the only way I would get a second test is I would have to pay for it.

Mr. SCHUMER. Right.

Ms. JONES. So, I went back to this clinic and begged this lady. She said, "We can't do it." She said it cost $75. I said, "I don't care. I'll pay." And I begged her, and she finally gave me this one that was negative.

Mr. SCHUMER. So, you did get a negative test?

Ms. JONES. Another one. Not from them. From this lady, the nurse.

Mr. SCHUMER. Did you try to bring that to the attention of the school authorities?

Ms. JONES. I sure did. I had written about that, too. They said no hearing.

Mr. SCHUMER. They said "No"?

Ms. JONES. "No."

Mr. SCHUMER. Even though you had gone and paid $75 for your own test that came out that you were 100-percent clean from drugs?

Ms. JONES. They told me no.

Mr. SCHUMER. You brought it back, and they said, "Forget it. You're out"?

Ms. JONES. No hearing. I was just fired.

Mr. SCHUMER. Let me ask you another question. How did your family, your husband, your children react when you told them about this?

Ms. JONES. They didn't believe it. They couldn't believe it. They thought I was kidding, too, until they found out that I wasn't, because I wasn't getting up and going to work. They knew that I loved that job.

Mr. SCHUMER. Fine. All right. Okay.

How did the people in your—what did you tell your friends, people in your church? I mean, did they know? What happened?

Ms. JONES. They found out later what happened, and they—it was like I was a disease, you know, like going to church, everybody turning around and looking at you like you were some kind of——

Mr. SCHUMER. How did they find out what had happened?

Ms. JONES. I think it was because—I think it's the news media thing. I think they heard it there.

Mr. SCHUMER. In other words, it was announced?

Ms. JONES. I think it was here in northeast, "Juanita M. Jones, northeast resident," and I think it was here they pointed the finger right there.

Mr. SCHUMER. And once again, despite the fact that you have a perfect, exemplary work record——

Ms. JONES. Right.

Mr. SCHUMER [continuing]. Your employer said one bad test, even though it was a simple test and one that both Dr. McBay and Dr. Mulé would say would have, if not given under the ideal conditions, would have a significant chance of error, you were not given a second shot at all?

Ms. JONES. They would not give it to me.

Mr. SCHUMER. Okay. Well, the purpose of my legislation is to protect people like yourself, to protect people who are in that situation and there are lots of them, and more and more of them will be.

Let me ask a few other questions.

Mr. Soley, you were the lawyer who represented Ms. Jones when she went to court. If she had been in the private sector, would she have any recourse at all?

Mr. SOLEY. None. None at all. At the time Ms. Jones was not a union employee who would have had the benefits of a collective bargaining agreement. She had no contract, so she would have had no rights whatsoever.

Mr. SCHUMER. Right.

Two other questions.

First, I have heard that the kind of test that Juanita failed could have been triggered by Advil. Is that accurate? Maybe one of the gentlemen would like to comment on that, since we have some experts.

Mr. SOLEY. I can say that Civa Corporation, which was the manufacturer of the test that Ms. Jones took—and I should also point out that they have withdrawn this test—that they did in February 1986 put out a bulletin which said that Advil, Nutrin, Motrin, any other drugs containing Ibuprofin would have or could have created a false positive for the test, for the specific test that was given to Ms. Jones.

Mr. SCHUMER. And these are all legal drugs?

Mr. SOLEY. Absolutely.

Mr. SCHUMER. Okay.

Oh, yes, what about this. It's not just Advil. There is a story of Esther Peterson. Esther Peterson is the former assistant agriculture secretary. She is 88 years old, and she tested positive for heroin at the age of 88. [Laughter.]

Then, eventually, they found the reaction was caused by a poppyseed bagel. Does that surprise you? [Laughter.]

Mr. SOLEY. That's correct. I will defer to the medical doctors on the panel.

Mr. SCHUMER. Sure.

Mr. SOLEY. But there has clearly been a relationship.

Mr. SCHUMER. I mean, I know Esther is a lively woman and a leading consumer advocate, but I didn't think she's that lively.

Mr. MULÉ. I would like to address those two issues.

The Ibuprofin issue with the Civa EMIT test apparently, according to the company's literature, did cause some problems with one specific assay and one specific enzyme. The assay was the marijuana assay for THC for BOTSI, and the enzyme was malidehydrogenase.

Now, that assay, that enzyme is no longer used and has not been used for the last year or two. It was only in the 20 nanogram per mil cutoff level calibrator of that one assay. That is the situation with Ibuprofin.

It was never a great issue that I could ever see. We ourselves were not using the 20 nanogram per mil cutoff, since we were using the 100 nanogram per mil, and we're using the glucose-6 phosphate dehydrogenase enzyme assay.

Mr. SCHUMER. That's just what I was going to say, Doctor. [Laughter.]

Mr. MULÉ. The issue with heroin is that what you raise is not heroin, it is morphine, which is a metabolite of heroin.

But allow me to address that issue too.

There is and has been morphine and codeine in poppyseeds, real, not false. It is not a false detection by the analytical technology. The analytical technology sees morphine and sees codeine. Unfortunately, that morphine and codeine could be derived from a poppyseed product.

I have just submitted a paper for publication which has been accepted and is coming out in the issue of Clinical Chemistry which shows that you can completely eliminate that particular problem by analyzing for six monoaceteil morphine by gas chromatography

coupled with mass spectroscopy. The 6-MAM is not a metabolite of morphine, is not found in poppyseed products, is not found in the urine of people who eat poppyseed products.

Mr. SCHUMER. All right, Dr. Mulé——

Mr. MULÉ. It is only found in those individuals that utilize heroin.

Mr. SCHUMER. I read from what you and Dr. McBay are saying is not that the testing technology isn't there—it is—but that unless we have some safeguards and some regulations, that the best testing technology is not used or things on the way to the testing technology get in the way: they mix up samples or whatever.

So, it seems to me that both Dr. Mulé and Dr. McBay—Dr. McBay has explicitly stated that he is supporting legislation that I have introduced—it seems to me, Dr. Mulé, everything you say would indicate that there ought to be some kinds of safeguards and regulations, the kind that have worked in the State of New York. Do you disagree with that?

Mr. MULÉ. I believe the rights of individuals should be protected. Due process should be a part and is a part of our constitutional right. It should be utilized at all times, that individuals that do use drugs should seek help. Employee assistance programs ought to be in place. There ought to be agreements between organizations and unions with regards to helping individuals who may have fallen into the trap of drug usage. I have no quarrel with that particular issue whatsoever.

The only issue that concerns me at the moment, the critical aspect, is that drug testing can be done effectively, accurately, and reliably.

Mr. SCHUMER. Right.

Mr. MULÉ. That is the same right.

Mr. SCHUMER. If people are willing to A, spend the money which private companies have certain built-in characteristics—take this situation: it's simply an application process, it's not even a worker whom they've spent money training. The private company has almost no incentive to go through the safeguards that you have outlined to see that they get an accurate reading. That is all we are trying to do here.

Mr. MULÉ. Well, I think they leave themselves open to lawsuits.

Mr. SCHUMER. Mr. Soley, is there any lawsuit now that could rest—I don't think there is with a private company—that would succeed unless we pass some kind of legislation like this?

Mr. SOLEY. There are certain theories that are available for a litigant to use. But it is unlikely that a private employee can seek redress unless the State constitution or a State law or a Federal law protects that person.

Mr. SCHUMER. Right.

I don't think I have any further questions, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Schumer.

Let me just proceed along the line that Mr. Schumer was at the end there.

For the three main drug tests—and this comes out of the GAO report and study—in use, one of the most common is what they call the EMIT, the enzyme multiplying immunoassay technique. Let me read you what the report says:

EMIT is one of the most common tests used to screen urine for drug residues because it is relatively inexpensive. It costs only $15 to $25 per test. The most common problem with this test is the so-called false positive problem, i.e., detecting the presence of illegal drugs when they are not present. The problem occurs because in the EMIT test, over-the-counter and prescription drugs may appear as illegal substances.

I think what Mr. Schumer was alluding to is the fact that if you rely on this test and this test alone, you are going to get that most common problem, the false positive identification.

Mr. MULÉ. I don't fully agree with that. What I do agree with is that you don't rely on a single screening test. It must be confirmed. No question about that.

Mr. SCHUMER. Which is what, Mr. Chairman, the legislation requires.

Mr. MULÉ. But I do not necessarily agree with the idea or the comment that these screening techniques, the EMIT in particular, radioimmune assay, are cheap and inaccurate. They are relatively inexpensive, I agree with that, as compared to the confirming technology. But the screening techniques are not that inaccurate.

I have done lots of studies and published lots of papers, and I can assure you that in most cases we find—and we use the EMIT and have used it since about 1973—we find it to be accurate in the neighborhood of about 97-98 percent. I would say a 95 to 100 percent range is not an uncommon experience, and I have data to indicate that.

Now, that does not mean that you can have at a given point in time a drug molecule that may interfere, and those assays are class-specific, not necessarily drug-specific. So, you have cross-reactivity associated with it.

But they are relatively good assays, and they are required because generally less than 10 percent of your sample, total sample, may be required for confirmation. So, you are in a high range of not having to confirm, 90 percent. One has to eliminate that because your confirmation technology is much more complex, much more sophisticated, and doesn't have the capability of handling high numbers unless you have many instruments or many people.

Mr. SCHUMER. Mr. Chairman.

Mr. MARTINEZ. Yes, Mr. Schumer?

Mr. SCHUMER. Thank you, Mr. Chairman.

Yes, I just would say, first, let me say that you said that the screening test has a 95 percent rate of accuracy.

Mr. MULÉ. I have seen that. I have seen that.

Mr. SCHUMER. You have seen it go that high. Even 95 percent, I would argue, Dr. Mulé, if the screening test is used alone, that's 1 in 20 people.

Mr. MULÉ. Oh, I wouldn't use it alone. No, don't misunderstand me.

Mr. SCHUMER. But we heard testimony right before you came, from the GAO, that many companies do just use it alone.

Mr. MULÉ. Well, that cannot be done under the New York States regulations for workplace testing.

Mr. SCHUMER. I understand. Right.

Mr. MARTINEZ. Well, that is one of the reasons why we like your regulations, and that is what we are trying to accomplish with Mr.

Schumer's bill to assure that there is confirmation testing, which isn't taking place now in a majority of the places that they are doing drug testing. Mr. McBay, would you like to respond to that?

Mr. McBAY. Yes. The advantage of the split sample is that the company is going to be rather embarrassed if the employee takes his sample out to a reputable laboratory and they do both a screening test and a confirmation test and let's say they did find the screening test positive or they didn't, whichever way, and they can't confirm it.

In other words, that is the advantage of it. In fact, that's how it's used in athletics and everywhere else. That is the very reason for it, because of so-called administrative error: somebody has a tray of 100 specimens and somebody switches a label, you've got two errors now, one person who's got a drug isn't detected and the person who hasn't got a drug is blamed.

And don't tell me they don't happen. I have far fewer samples in my laboratory and we do everything we can, but we do find problems such as that occurring. We can't have two people standing and watching everybody do some particular test. But we come back, of course, and recheck it when there is any question.

Of course, this way you would have a sample. And as far as the test—and I am sure in Dr. Mulé's laboratory, I would say he might run better than 95, 98 percent or something, or 99 percent. But gosh, in the laboratory that tested Ms. Jones, and the cases I was considering, I would think they might run more around 60 or 70 percent and they don't even know.

And it doesn't have to be Motrin or something like that that did it. Cloudiness and everything else would have affected their procedure and they wouldn't know any different.

Mr. MARTINEZ. What I think I hear you saying, Dr. McBay, is that you are somewhat in disagreement with Dr. Mulé in that you somewhat agree with the statement I read from the GAO report.

Mr. McBAY. I agree with what?

Mr. MARTINEZ. Based on the statement that I read from the GAO report, that in one of the most common tests used to screen urine for drug residues because it's relatively inexpensive but the most common problem with the test is the so-called false-positive problem.

Mr. McBAY. Sure. False positives, false negatives. Also, you're paying—in fact, the smart laboratory will come up with very few positives and they can make good money that way. [Laughter.]

Mr. MARTINEZ. Mr. Schumer?

Mr. SCHUMER. Yes, just two other questions.

First, Dr. Mulé, Dr. McBay, to go beyond the screening tests and do the full regular test, how much does that cost per person?

Mr. MULÉ. Well, that depends on the laboratory. What do they charge?

Mr. SCHUMER. Yes. Give me some range. Yes, I am a company, I am an employer, I have a hundred people.

Mr. MULÉ. I would say your acceptable range today for a GC mass spec test is $50 to $200.

Mr. SCHUMER. Okay.

Mr. MULÉ. Per test.

Mr. SCHUMER. That is my point, that if it's going to cost the company, say, $100 or $200 to do the secondary test, many companies, if left on their own, will just say the heck with it, let's get rid of the employee. And that's what happened to Ms. Jones here.

Mr. MULÉ. That's a distinct possibility.

Mr. SCHUMER. Right.

I just wanted the record to show, Mr. Chairman, that the real test, as opposed to the screening test which may have a rate of 60 percent or 98 percent or whatever, is a test that runs oftentimes over $100, as high as $200.

Ms. Jones, I have just one more question that I wanted to ask just to bring it out for the record's sake so our colleagues can see it.

I understand that when you did work, your work extended beyond your working hours, that you would visit some of the children on the buses afterwards, you would take them places and kept up a relationship with them. Could you describe that for us?

Ms. JONES. In the summertime usually I would have them over for barbecues or something, you know, the children that I worked with, yes.

Mr. SCHUMER. And that is the courtesy you got after this test. Okay.

Ms. JONES. Yes.

Mr. SCHUMER. Mr. Chairman, I don't have any more questions.

Mr. MARTINEZ. Thank you, Mr. Schumer.

Let me close by saying that clearly companies have a critical interest in how their workplaces are conducted and in the productivity of the workers. There is no question that the abuse of drugs and alcohol have a negative financial impact on the company's ability to function effectively and profitably.

On the other hand, employees who have dedicated their loyalty and a length of service to the company have a right to an expectation of privacy, dignity and presumption of innocence and the due process rights accorded by the Constitution and laws of the jurisdiction.

I am hopeful that the testimony that we have received here today will lead us to a speedy solution before the abuses of testing become as great as the drug abuse itself.

We thank you for your expert testimony here today. We assure you that it will be very beneficial to us as we proceed. Thank you again. We are now adjourned.

[Whereupon, at 12 noon, the subcommittee was adjourned.]

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